SECOND QUARTER 2016

KENTUCKY

PENAL CODE – KRS 500 – SELF DEFENSE

Biles v. Com., 2015 WL 3533020 Ky. App. 2015 (HELD OVER FOR FINALITY)

FACTS: On September 4, 2012, Biles and Griffin, a dating couple, took the bus together from Covington to Florence. When they arrived and got off the bus, and they crossed the street, "Biles suddenly jumped on [Griffin's] back, pulled her to the ground, and began hitting and kicking her." Biles called 911 and during the call, admitted he'd committed the assault. When police and EMS arrived, they found Griffin "extremely bloody" and lying on the ground. (She was so bloody that an EMT thought she was dead, initially.) Biles repeatedly said he'd beaten her (albeit a bit more profanely) "because she deserved it." During the arrest, officers had to threaten the use of a Taser. Even while being booked, Biles asked another woman "if she needed a boyfriend because he had just kicked the [expletive] out of his girlfriend."

Griffin had a deep laceration that exposed the skull, a break to the bridge of her nose, multiple facial fractures and bleeding on the brain. Reconstructive surgery was needed, but she stayed only overnight at the hospital. She stayed with a caregiver for ten days as she was unable to take care of her own needs and could not even swallow pills, needing a liquid painkiller for the injuries to her face.

Biles was charged with Assault 1st. At trial, Biles admitted he'd beaten her but denied having kicked her. He was convicted and appealed.

ISSUE: 1). Can a boot worn by an actor qualify as a dangerous instrument?
2). Must injuries be potentially fatal in order to be classified as serious physical injury?

HOLDING: 1) Yes
2) No

DISCUSSION: At trial, the Commonwealth argued that Biles had committed Assault 1st by kicking Griffin and that his boots qualified as dangerous instruments. (Biles argued that he had not kicked her at all.) The trial court glossed over this issue, apparently accepting the jury verdict that his boot was used and qualified as a dangerous instrument.

Biles also argued that the Commonwealth failed to prove a serious physical injury. The Court noted that although the treating physicians did not indicate they believed her injuries were "potentially fatal," the Court noted that EMS had actually started two IV lines because of the dramatic loss of blood, which in itself constituted a substantial risk of death.[1] The testimony of the emergency responders and the caregivers clearly indicated she suffered a serious physical injury. The need for surgery and facial reconstruction, which including the rebuilding of one cheekbone to support her right eye, and which had the potential for chronic pain and flattening in the face, along with the reality of permanent metal plates in the face, was more than enough to qualify as serious and prolonged disfigurement or impairment of health. Her recovery was also painful and prolonged. The Court noted that each injury was distinct so there was no specific case on point, but looked to other cases that indicated the inability to eat normally for several weeks was a factor, as was surgery under general anesthesia, insertion of plates and screws and the inability to walk for some time. The Court agreed she suffered a qualifying injury.

[1] See Brooks v. Com., 114 S.W.3d 818 (Ky. 2003).

Biles also argued that the Commonwealth failed to disclose several oral incriminating statements he'd made (detailed in the facts above) pursuant to RCr 7.24(1), which were told to the jury by testifying officers. Officer Duncan, for example, testified that Biles had said he'd kicked Griffin, and the officer had taken a photo of the bloody toe of Biles' boot. (Upon discussion out of the presence of the jury, the officer clarified that Biles had said that he'd "'kicked Griffin's ass' – not that he had kicked *her*.") The Court agreed there might have been some confusion, but that it had been appropriately clarified. Det. Dickhaus testified that he'd heard the statement at the jail, which drew an objection because it had not been disclosed in writing. (It had apparently been mentioned in a pretrial conversation with defense counsel.) The trial counsel accepted this and did not further object, which made the issue moot.

The Court upheld his conviction.

PENAL CODE – KRS 506 - FACILITATION

Com. v. Jennings, 490 S.W.3d 339 (Ky. 2016)

FACTS: Jennings' daughter got into a fight with a schoolmate. Jennings apparently believed that Washington (the schoolmate's father) was "unhappy with the outcome of the first fight between the two girls, instigated a second fight under his oversight to keep others from interfering. The police responded to the scene and broke up the fight." McDaniel, angry about the second fight, went in search of Washington. Jennings went with him. McDaniel did not know Washington, but Jennings did, and as they drove through the neighborhood, Jennings called out to Washington, "alerting McDaniel to the location of his victim." McDaniel then got out and shot Washington four times. He and Jennings then drove away.

Jennings was charged with criminal facilitation to assault, based on her identification of Washington. She was convicted, but the Court of Appeals reversed her conviction based on jury instructions that did adequately cover the charge. The prosecution appealed.

ISSUE: Is it Criminal Facilitation to actively assist someone in committing a crime?

HOLDING: No

DISCUSSION: The Commonwealth argued that the jury instruction was adequate and did not need to have "incorporated the language of KRS 506.100(1), which provides that "[a] person is not guilty of criminal facilitation when: (1) The crime facilitated is so defined that his conduct is inevitably incident to its commission." The trial court noted that Jennings never asked for the language or object to the instructions ultimately given.

However, the Court noted that the instructions were not flawed. The Court noted that the essential elements have "nothing to do with the particular conduct of the parties involved in a particular criminal event and whether the particular crime would have "inevitably" occurred without the facilitator's help."
The Court noted that it had never had cause to address the language in question before, but noted that Substantially similar language is also used in two other statutes. KRS 506.050(4) provides an analogous exemption for criminal conspiracy. It states: "No person may be convicted of conspiracy to commit a crime when . . . *that crime is so defined that his conduct is inevitably incident to its commission."* KRS 502.040(1) provides the same exemption for accomplice liability: "A person is not guilty [as an accomplice] for an offense committed by another person when: (1) *The offense is so defined* that *his conduct is inevitably incident to its commission . . . ."*[2]

The Court continued:

> Upon review and thoughtful consideration, it becomes apparent KRS 506.050(4) is simply a codification of the well-established common law doctrine known as "Wharton's Rule" which has been incorporated into the modern penal codes of many states, 4 including Kentucky, and which

[2] See also KRS 509.050.

the drafters of our penal code extended to the crime of criminal facilitation under KRS 506.080 and to accomplice liability (complicity) under KRS 502.020.

The widely recognized rule of construction known as Wharton's Rule states that when a substantive offense necessarily requires the participation of two persons, and where no more than two persons are alleged to have been involved in the agreement to commit the offense, the charge of conspiracy will not lie.[3]

As generally stated, [Wharton's] Rule prohibits prosecution of a conspiracy to commit a particular crime when the commission of that crime requires the participation of more than one person. The crimes of dueling, bigamy, adultery, and incest are the classic Wharton's Rule offenses. Commentators have added to that list the crimes of pandering, gambling, the buying and selling of contraband goods, and the giving and receiving of bribes.[4]

As a vestige of Wharton's Rule, KRS 506.100(1) simply provides that one cannot be guilty of criminal facilitation for participation in a crime that by its very definition requires the mutual participation of two or more persons. For example, the crime of sports bribery under KRS 518.040(2) 5 is a Class D felony so defined as to require the participation of a sports official and a person conferring (or offering to confer) a benefit upon that sports official. KRS 506.100(1) precludes the state from charging the sports official with criminal facilitation for providing the briber with the means or opportunity to commit sports bribery, conduct that would otherwise constitute the crime of criminal facilitation. For the same reason, pursuant to KRS 506.050(4), the sports official could not be charged with conspiracy to commit sports bribery, and under KRS 502.040(1), he could not be charged with sports bribery as an accomplice of the briber. To be clear, a culpable sports official might be guilty of some other offense, but under our statutory adaptations of Wharton's Rule, he cannot be charged with criminal facilitation of sports bribery, conspiracy to commit sports bribery, or sports bribery by complicity with the briber.

In this case, the Court noted that the:

… crime facilitated was first degree assault, which as defined in KRS 508.010(1) does not require the participation of two persons; it does not as defined require one person to identify the victim and another to strike the blow. As a matter of law, Jennings's participation was not "inevitably incident" to the crime of assault. KRS 506.100(1) is inapplicable and stands as no barrier to Jennings's prosecution.

The Court agreed that “because the application of KRS 506.110(1) addresses itself exclusively to the nature of the crime and is independent of any factual particulars of the specific case, we cannot conceive that it would ever be an appropriate issue for a jury's consideration such that it would be included in jury instructions. The U.S. Supreme Court noted that "[t]he classic formulation of Wharton's Rule requires that the conspiracy indictment be dismissed before trial.” Wharton's description of the Rule indicates that, where it is applicable, an indictment for conspiracy 'cannot be maintained.'"[5] Thus, the exemption is intended to preclude prosecution as a matter of law; it is not a factual issue to be decided by the jury. For the foregoing reasons, we conclude that the trial court correctly omitted a jury instruction based upon KRS 506.100(1). We therefore reverse that aspect of the Court of Appeals' opinion.

On an unrelated note, the Commonwealth had “introduced into evidence at trial four text messages which police had discovered when they examined Jennings's cell phone. Jennings contends that the initial seizure of her phone by police was unlawful and that the subsequent search of her phone, which led to the discovery of the incriminating evidence, exceeded the scope of the consent provided by Jennings, and was therefore, illegal.” The Court agreed that the issue of whether “police officers searched the

[3] 1 R. Anderson, Wharton's Criminal Law 86 Procedure s 89 at p. 191 (1957). State v. Langworthy, 594 P.2d 908 (Wash. 1979).
[4] People v. Laws, 613 N.E.2d 747 (Ill. 1993).
[5] Iannelli v. U. S., 420 U.S. 770 (1975).

contents of her phone beyond the limited consent she gave them was preserved, and so we proceed to consider that argument."

> Soon after the shooting, police identified Jennings as a "person of interest" with whom they wished to speak. Jennings went to the police station to discuss the incident. After being asked to leave her cell phone on a detective's desk, she was ushered into to an interview room. According to the detective, police interviewers routinely take cell phones away from the interviewee to avoid distractions during the interview. Shortly after the start of the interview, Jennings was advised of her *Miranda* rights. During the interview, Jennings told the police that she and McDaniel exchanged text messages, and that his phone number was stored in her cell phone under a pet name she used for him. When the detective asked to examine her phone to find McDaniel's phone number, Jennings consented to the officer's search of her phone for that purpose. The trial court concluded that the officer had not improperly examined the contents of the phone in excess of Jennings's consent and so it denied the motion to suppress. The Court of Appeals affirmed that ruling. When reviewing a ruling on a suppression motion, we defer to the trial court's findings of fact if they are not clearly erroneous. Findings of fact are not clearly erroneous if they are supported by substantial evidence.[6] Substantial evidence is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."[7] We review the trial court's application of the law to the facts de novo. From the evidence presented at the suppression hearing, the trial court found that the Jennings's consent to search the cell phone for McDaniel's phone number was not limited to specific designated files, such as her "contacts" directory or her text messages. The trial court found that Jennings authorized the officer to look for McDaniel's number and that the detective did not extend his search beyond the places one might reasonably expect to find a phone number. After examining the phone, the officer used information gleaned from it to obtain a search warrant authorizing a broader examination of the phone. Upon review of the record, we find that the trial court's factual findings were supported by substantial evidence. Consequently, the trial court's findings are binding on our analysis whether the detective's search exceeded the scope of Appellant's consent. "Objective reasonableness" is the standard used to the measure the scope of a person's consent to search under the Fourth Amendment.[8] We assess the scope of the search by asking "what would the typical reasonable person have understood by the exchange between the [detective] and [Jennings]?" Jennings's consent did not expressly limit the search to the phone's "contact" directory listings. It was objectively reasonable for the detective to look for McDaniel's phone number in places other than Jennings's "contacts." Contact information, including phone numbers, are routinely exchanged by 14 text messages so it is objectively reasonable to look there for a phone number. Furthermore, the detective testified that, although he looked at text messages on Jennings's phone, he did not see the particular messages at issue in this case until after securing the warrant. We agree with the trial court and the Court of Appeals that the text messages introduced into evidence were not subject to exclusion based upon the Jennings's premise that the search exceeded the consent. We might agree with Jennings that the detective exceeded his authority when he looked at photos stored on the phone. He testified that he only "clicked" on the photo that appeared in Jennings' contacts beside the entry identified as "my man." Any overreach in that aspect of his investigation did not produce the evidence that Jennings seeks to suppress.

The Court affirmed the Court of Appeals' conclusion that the trial court properly declined to suppress the incriminating text messages.

[6] Simpson v. Com. , 474 S.W.3d 544 (Ky. 2015).
[7] Owens-Coming Fiberglas Corporation v. Golightly, 976 S.W.2d 409 (Ky. 1998).
[8] Florida v. Jimeno, 500 U.S. 248 (1991).

PENAL CODE – KRS - CRIMINAL HOMICIDE

Shouse v. Com., 481 S.W.3d 480 (Ky. 2016)

FACTS: On May 21, 2011, Shouse took a Xanax and then dropped off her toddler while shopping. She picked up her son about 8 p.m. and returned home, where she took a second Xanax. About 12:30 a.m., she took a visiting friend to buy marijuana and then took Burch (the provider of the marijuana) to another location where they sat and talked. About 3 a.m., she bought a snack and returned home, leaving her son in the car. About 3 p.m. that day, her mother, concerned, showed up and awakened Shouse from a stupor. They found the child still in his car seat, deceased. A quantity of drugs was found in the apartment.

Shouse was convicted of Murder, Criminal Abuse and Wanton Endangerment. She was convicted of wanton murder, abuse and related offenses. Shouse appealed.

ISSUE: When a child dies after being left in a car seat, what is the highest possible charge?

HOLDING: Manslaughter 2nd

DISCUSSION: Shouse argued that under KRS 507.040(1)(b), which was changed in 2000, she could only be charged with Manslaughter 2d under the circumstances, not Wanton Murder. That year, more specific language concerning leaving children in vehicles in circumstances that caused their death was added to the homicide statutes, indicating that such circumstances fell specifically under Manslaughter, rather than Murder. Legal scholars "have suggested that in passing this statute, the General Assembly 'was almost surely trying to provide for criminal liability that it believed not to exist, motivated by publicity about recent instances in which small children have suffered death or serious physical injury from being left in sun-heated vehicles.'" But, they noted, the General Assembly "almost surely acted erroneously in believing that there was under the preexisting statute no basis for liability of such conduct." They pointed out that a person could have been convicted under the prior second--degree manslaughter statute, which states "a person leaving a child in a dangerous situation (such as unattended in a sun-heated car) could have been convicted upon a showing that he/she had acted wantonly (consciously disregarding the risk) in causing the death." It was noted that it is "also possible the legislature viewed death of a child under these circumstances as, on at least some occasions, having elements of negligence that mitigate the criminal nature of the act, such as when a parent who did not usually take a child to the sitter, being distracted by getting to work, forgets to drop the child off and leaves the sleeping baby in the car seat. While nonetheless reprehensible, the grief and self-blame that follows such conduct could be viewed as strong punishment that calls for a lesser criminal offense than murder."

Ultimately, however, the Court noted, it "does not matter" because the statute is clear, when the death occurs as a result of a child being left in the car, "those facts create the offense of manslaughter second degree and no other." The Court agreed that a Wanton Murder charge was thus, improper. Although the conduct clearly falls under the plain language of both statutes, since the General Assembly created a specific statute, only the specific charge could be applied. The mental state (aggravated wantonness) exists in both, but "both statutes cannot control, nor can Shouse's conduct have violated both. She can be convicted of only one homicide offense." By the General Assembly tying the manslaughter charge to a "very specific set of facts" – it clearly distinguished it from the murder. As such "a death that happens this way is *not* murder, but is rather second-degree manslaughter." By statutory construction rules, "the more specific statute controls over the more general statute."[9] In fact, by adding the element of *aggravated* wantonness, it made prosecuting someone even under the manslaughter statute more difficult.

The Court agreed, however, that it was not double jeopardy to convict her of both abuse and a homicide statute. Other procedural issues were also resolved, including a statement by an investigator that although Shouse initially agreed to give a blood/urine sample for drugs, she changed her mind and

[9] Light v. City of Louisville, 248 S.W.3d 559 (Ky. 2008).

refused. Shouse argued that this impacted her right to remain silent but a proper objection had not been made at the time.

The Court reversed her conviction for Wanton Murder and Wanton Endangerment, but her Criminal Abuse conviction was affirmed. The case was remanded for a possible retrial under Manslaughter 2nd.

PENAL CODE – KRS 508 – ASSAULT

Pennington v. Com., 2016 WL 3370983 (Ky. 2016)

FACTS: On April 12, 2014, Pennington, an inmate, was serving as a kitchen worker at the Kentucky State Penitentiary (Lyon County). He attacked a contract worker and struck her repeatedly on the head with a tool handle. Ultimately the worker was transported by aeromedical and the paramedic later testified he could "see bone through the lacerations" on her head. Medical testimony later indicated she'd suffered a serious orbital fracture (around the eye) and nine deep lacerations, along with a concussion. Fortunately, however, she was able to be released within a day but was still in treatment for a variety of related symptoms at the time of trial. She was also classified as having had a traumatic brain injury and suffered ongoing neurological complications. She had not returned to work.

Pennington was charged with Assault 1st, but argued that he was entitled to an Assault 2nd instruction as well at trial. That was denied. He was convicted of Assault 1st and appealed.

ISSUE: Is evidence of long-lasting symptoms from head trauma sufficient to prove serious physical injury?

HOLDING: Yes

DISCUSSION: The issue in this case was the degree of injury she sustained, physical injury versus serious physical injury. Although each injury is unique, the court agreed that in this case, a rational jury could only consider the victim's injuries to be serious, given her proven litany of injuries and resultant complications. Even though she was pursuing a civil lawsuit against the prison, given her reason to exaggerate her injuries, the medical testimony was more than sufficient to support her contention that her injuries were, in fact, serious.

The Court affirmed his conviction.

Haws v. Com., 2016 WL 2638028 (Ky. App. 2016)

FACTS: On May 28, 2014, Trooper Smith (KSP) was parked in a Ballard County gas station, observing traffic. At about 11 p.m., he spotted a vehicle "driving erratically and at a high rate of speed." He gave chase, but the "vehicle did not stop immediately; rather it continued a few blocks and pulled into a driveway." Haws got out and headed toward what turned out to be his home."

> Trooper Smith ordered Haws to stop, but Haws ignored him and ordered him to leave his property. As Haws walked to his front door, Trooper Smith observed that Haws' speech was slurred and that he smelled of alcohol. He also noticed blood coming from Haws' elbow."[10] Trooper Smith followed him to the doorway and told him to come outside. "Haws belligerently refused to speak with Trooper Smith and continually demanded that he leave his property." Haws was about 10 feet inside, and "in an aggressive posture." Trooper Smith pointed his Taser at Haws, who stepped closer and reached toward a nearby TV. Haws discharged the Taser into Haws' chest, and a "pair of brass knuckles fell out of his right hand." Haws continued his resistance and was Tased a second time. He finally complied and was taken into custody.

[10] In fact, he had earlier broken into a home and was being sought by other officers, who were looking for him. Trooper Smith did not know this at the time.

Although initially charged differently, Haws was indicted for "first-degree fleeing and evading (motor vehicle), third-degree assault, reckless driving, operating a motor vehicle under the influence of alcohol, second offense, and first-degree persistent felony offender." He was convicted and appealed.

ISSUE: Is taking possession of a weapon enough to prove that a substantial step towards an assault has been committed?

HOLDING: Yes

DISCUSSION: On the Assault charge, the prosecution argued that "Haws intentionally attempted to injure Trooper Smith by attacking him using a set of brass knuckles." Haws argued "there was no evidence presented at trial that he lunged at, swung at, or caused any physical injury to Trooper Smith; therefore, it would be unreasonable for the jury to find that he took a substantial step in committing third-degree assault." The Court, however, disagreed, looking to Com. v. Prather, which stated that ""[S]ubstantial steps . . . are overt acts . . . which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon observation of such incriminating conduct, in order to prevent the crime when criminal intent becomes apparent."[11]

> In KRS 506.010(2), [c]onduct shall not be held to constitute a substantial step . . . unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting." The "no reasonable doubt" requirement of this section is a matter for jury determination. [12]

The Court agreed that when the trooper saw the intent, he properly intervened, and further "Haws was highly intoxicated; he was being hostile and aggressive toward Trooper Smith; he ignored Trooper Smith's lawful order to stop; he proceeded into his residence with clinched fists and attempted to grab a set of brass knuckles; and that Trooper Smith tased Haws and arrested him before the situation could escalate any further."

With respect to the fleeting and evading charge, the Court agreed that Haws did flee and not, as he argued, "simply choose to park at his house, which was only a block or two from where the officer initiated his lights." No particular distances was required to satisfy the charge, and Haws did not slow down or respond to the lights, he continued after making an 'aggressive turn."

Once he got out, he continued on foot into his house, against orders.

The Court upheld his convictions.

Kingdon v. Com., 2016 WL 3387066 (Ky. 2016)

FACTS: During the summer of 2012, Kingdon and Keen, his roommate, suspected that Robinson had burglarized their Louisville apartment and stolen money. Along with Dowell, they decided to confront him on the local bus. During the confrontation, Kingdon shot Robinson in the head, killing him. Luckett, a passenger, was sitting just feet away. Although Kingdon was arrested two weeks later, the gun was never found. He was charged with Murder and Wanton Endangerment (Luckett) and related charges.

At trial, Kingdon argued he thought Robinson was reaching for a gun and that he fired in self-defense. (Robinson, in fact, did have a gun.) During Kingdon's testimony in his own defense, he was questioned by the prosecution about prior interactions with law enforcement. He later argued that was improper.

ISSUE: Is shooting in close proximity to another individual Wanton Endangerment?

[11] 690 S.W.2d 396 (Ky. 1985).
[12] Slaughter v. Com., 45 S.W.3d 873 (Ky. App. 2000).

HOLDING: Yes

DISCUSSION: With respect to the Wanton Endangerment charge, the Court agreed that the cameras inside the bus clearly showed what occurred. Kingdon brought a loaded gun on a bus and pulled it within arm's reach of where Luckett, age 13, was sitting. He blocked her only means of escape, forcing her to have to push her way out of the group, at one point, coming between Kingdon and Robinson. Kingdon left the bus, gun in hand, coming within feet of Luckette again, as well. As such, the Court agreed Wanton Endangerment was appropriate.

With respect to the testimony, the Court agreed it was improper, but also held it to be harmless, given the wealth of evidence against him. With respect to a Tampering charge, the Court noted he clearly had the gun when he left the bus, but it was never found. The Court agreed, however, that simply because it was missing did not mean it was destroyed, concealed, or disposed of it so that it could not be used as evidence against him in a subsequent prosecution. Such an inference, without more evidence, does not support a reasonable finding of guilt. In Mullins v. Com., the defendant shot the victim and immediately left the scene with the weapon in his possession, but law enforcement officers failed to locate the gun.[13] We explained that "walking away from the scene with the gun is not enough to support a tampering charge without evidence of some additional act demonstrating an intent to conceal." We reiterated the same point in McAtee v. Com.: "merely leaving the scene with the murder weapon was insufficient evidence from which a reasonable jury could fairly find Appellant guilty of tampering with physical evidence."[14] The Commonwealth's theory leads to the paradoxical situation in which the complete lack of evidence concerning the gun becomes sufficient "evidence" to prove that Kingdon destroyed it, concealed it, or otherwise disposed of it. The theory is fundamentally flawed because it unconstitutionally shifts the burden to the defendant to prove his innocence."

The Court reversed the Tampering conviction.

Kingdon also argued he was entitled to a self-defense instruction, given that he believed Robinson had a gun. The Court noted that "person who initiates a violent physical confrontation against another person and then injures that person cannot avoid culpability by claiming self-defense, unless his initial aggression was non-deadly and the other person elevated the conflict by responding with deadly force. " The Court noted that:

> Kingdon was clearly entitled to have the jury instructed on the right to act in self-protection because the jury heard evidence that Kingdon did not raise his gun until he believed that Robinson was reaching for a gun. But the jury also heard testimony that Kingdon pursued Robinson by chasing and boarding the bus so that he could confront Robinson with a loaded gun and recover money Robinson stole. Even if Kingdon believed that Robinson was reaching for a gun, the foregoing testimony and the surveillance videos of the shooting provided sufficient evidence for the jury to reasonably find that Kingdon was the initial aggressor. The Commonwealth was entitled to have that theory presented in the jury instructions; thus, the trial court did not abuse its discretion in giving the initial-aggressor instruction.

The Court upheld the murder and Wanton Endangerment charges.

PENAL CODE – KRS 509 – KIDNAPPING

Taylor v. Com., 2016 WL 3370615 (Ky 2016)

FACTS: In August 2012, Taylor and Norman had been dating a month and had been living together in her Louisville apartment. On August 2, Taylor began asking her about cheating with another man, and "Tina [Norman], who was high at the time, laughed in response." He became angry and

[13] 350 S.W.3d 434 (Ky. 2011).
[14] 413 S.W.3d 608 (Ky. 2013).

assaulted her. Tina told him to move out and leave the key with her neighbor, and she packed up her two children and left.

When she returned, he was still there, but gave her the key and left. He returned about 11 p.m. to the complex. Tina, who was in another apartment at the time, spotted him robbing a child a gunpoint in the complex as she walked through, and she called police from the friend's apartment. Two of her friends were in her apartment at the time, Bagwell and Harvey.

> While Ms. Bagwell was stepping out of Tina's apartment to smoke, she was confronted by Taylor who told her to go into the apartment. He pulled out a gun and demanded that she tell him where Tina was. He also attempted to telephone Tina and demanded that Ms. Bagwell do the same. Taylor threatened to kill Ms. Bagwell and Ms. Harvey if they did not find Tina. At some point, he fired his gun into the floor of the apartment.
>
> While holding the two women at gunpoint inside the apartment, Taylor opened the apartment door and lured a boy named Osman Omar into the apartment. The victims were seated on a couch for about 25 minutes while being held at gunpoint. Upon hearing the police arrive at the scene, Taylor became upset and demanded to know who called them. Taylor then shot Osman twice, Ms. Bagwell once, and Ms. Harvey twice. Ms. Bagwell survived, but Osman and Ms. Harvey were killed.

SWAT responded and eventually, Taylor was apprehended. He was convicted of multiple charges, including murder and kidnapping. He appealed.

ISSUE: Is it the trial court's prerogative to decide if the kidnapping exemption is appropriate?

HOLDING: Yes

DISCUSSION: First, Taylor argued that the jury was not instructed on the kidnapping exemption, KRS 509.050.

It reads:

> A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

The Court noted that in Calloway v. Com., the Court had held that "the application of the kidnapping exemption is to be determined by the trial court and not by the jury."[15]

During the trial, the defense put on an expert on Taylor's diagnosis of PTSD, ADHD and intellectual disability. During the testimony, the doctor referenced a prior incident in which Taylor shot and wounded two officers, which Taylor argued was inadmissible as prior crimes or bad acts. "Evidence of prior crimes or bad acts must be relevant "for some purpose other than to prove the criminal disposition of the accused . . . ."[16] Evidence admissible under KRE 404(b) must also be relevant, probative, and not unduly prejudicial.[17] The Court agreed, however, that it was properly admitted to explore the diagnosis of PTSD, and how the shooting may have exacerbated it. The Court noted that Taylor had insisted that defense counsel question the doctor about the shooting, which occurred

[15] 550 S.W.2d 501 (Ky. 1977).
[16] Meece v. Com., 348 S.W.3d 627 (Ky. 2011).
[17] Bell v. Com., 875 S.W.2d 882 (Ky. 1994). *See also* KRE 401; 402; and 403."

when he was 18. The jury was carefully instructed and no mention was made of any criminal charges in that instance.

Also, the Court discussed the admission of Taylor's IQ, which ranged from subnormal to low normal, depending upon the test. Taylor wished to submit evidence that indicated his IQ was relevant to his extreme emotional disturbance (EED) defense, and is "relevant to the "circumstances" through which he views the world." The Court noted that the expert witness testified about Taylor's "psychological and cognitive deficiencies, including Taylor's PTSD, ADHD, *and* his intellectual disability." The Court did not find it relevant during the guilt phase, however.

Taylor argued that information about a handgun and ammunition found in his car was improperly admitted. (The car was in the parking lot during the shooting.) The Court agreed that "In Harris v. Com., we made clear that "weapons which are not used in the commission of the crime are not admissible."[18] It is undisputed that the .45 caliber handgun and ammunition discovered in Taylor's car were not used during the commission of the crimes for which he was convicted. In Harris, however, one of the inadmissible guns was recovered at Harris' home, four days after the murder for which *Harris* was charged and convicted. The other inadmissible weapon was located in the Cincinnati Police Department property room. Here, Taylor's weapons were discovered in his car at the crime scene. The Commonwealth argues that this evidence is relevant to the issue of intent and EED."

The Court noted that "the fact that Taylor arrived at the crime scene with multiple weapons and additional ammunition is at least somewhat relevant to his state of mind and preparation leading up to the crimes in order to prove murder. Whether EED negates this intent is a separate issue." The Court agreed that while possibly error, it was harmless.

Taylor's conviction was affirmed.

PENAL CODE – KRS 510 – RAPE

Callahan v. Com., 2016 WL 3369189 (Ky. 2016)

FACTS: In 2006, Callahan and his family moved to Clay County. There, he was accused of committing sex crimes against his two daughters, under 18, and stepdaughter, age 6. His wife was also indicted and provided a statement, and ultimately pled guilty to Sodomy 1st (by force). However, the oldest daughter recanted her prior statement at trial, but her statement was admitted.[19] He was convicted of numerous charges and appealed. (The Commonwealth conceded that since it failed to prove that one of the victims was under 16, as well as conceding that it failed to prove that Callahan himself committed sodomy against his two daughters those convictions should be reversed,.) That left charges of rape against two of the girls, incest against all three and sexual abuse against his daughters.

ISSUE: Is sexual assault by mental compulsion "forcible?"

HOLDING: Yes

DISCUSSION: Callahan argued that no forcible compulsion was proven in the case him for the rape of his daughter (who was over 16) and the sexual abuse of the other daughter, also over 16. The Court looked at the definition of such, in KRS 510.010(2) defines forcible compulsion as: "physical force or threat of physical force, express or implied, which places a person in fear of immediate death, physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this chapter. Physical resistance on the part of the victim shall not be necessary to meet this definition[.]"

[18] 384 S.W.3d 117 (Ky. 2012).
[19] Jett v. Com., 436 S.W.2d 788 (Ky. 1969)

In Yates v. Com., the stated that "forcible compulsion, which must be the means of effecting sexual contact, can be accomplished in two ways: by physical force or by threat of physical force."[20] The Court noted that Rebecca's testimony clearly supported forcible, as she described physical abuse during the assaults. In Yarnell v. Com., for example, the Court agreed that there was a clear indication of forcible compulsion when the "victims were under constant emotional, verbal, and physical duress.[21]

Callahan also argued there was no clear differentiation between crimes in Clay County, and possible crimes that occurred in Clark County, where they lived before. However, the Court agreed that the jury instructions and the testimony made it clear which event was being charged, and where it occurred. The Court also discussed the dates of the alleged incest, and agreed it was also properly charged.

Finally, the Court also looked at testimony of a child advocate who had interviewed the younger child and described her demeanor. The child had been deemed incompetent to testify. The Court agreed that describing demeanor was not hearsay.

Also, Callahan objected to testimony about the usual protocol of investigators in such cases. The Court agreed that "This type of evidence is generally relevant in any child sex abuse case, and certainly here, where Callahan directly challenged the thoroughness of the investigation."

Callahan's convictions (that had not been conceded) were upheld.

Hawkins v. Com., 2016 WL 3035591 (Ky. App. 2016)

FACTS: Hawkins worked both as a deputy sheriff and deputy jailer in Christian County. In 2012, Butler was a jail inmate, and they met while Hawkins was working in the commissary. Hawkins gave her free items from there. She was paroled and required to attend an in-house program in Henderson County. Hawkins sent her a letter and they subsequently began meeting and having sex during the spring of 2013, while she was still at the program, while Hawkins was on duty as a deputy sheriff. She left the program and the state, although eventually, she was returned via extradition.

Hawkins was indicated in 2013 for Official Misconduct 1st, Hindering, Sodomy/Rape 3d, the latter emanating from KRS 510.060/.090, "which criminalize sexual intercourse/deviate sexual intercourse between, *inter alios*, an employee of a detention facility and a parolee who is under the supervision of the Department of Corrections." Hawkins tried to have the two statutes declared unconstitutional, since they engaged in adult consensual sex acts and that the statute is overbroad. The trial court denied it. He was convicted of most of the charges and appealed.

ISSUE: Is a prisoner considered legally incapable of giving consent to an authority figure at the jail, for sex?

HOLDING: Yes

DISCUSSION: The Court looked to the statutes in question and that they did not require a separate consent element. While it is true that the General Assembly has declared lack of consent a necessary element in every sexual offense, "this lack of consent on the part of the victim may occur when the victim is considered by law to be incapable of giving consent.[22] The General Assembly has agreed that a person in Butler's situation is "legally incapable of consenting to sexual intercourse/deviate sexual intercourse with a person who is employed by a detention facility." The Court agreed that this supported the jury instructions and that the statute is not overbroad.

The Court affirmed his convictions.

[20] 430 S.W.3d 883 (Ky. 2014).
[21] 833 S.W.2d 834 (Ky. 1992).
[22] *See* Stinson v. Com., 396 S.W.3d 900 (Ky. 2013).

PENAL CODE – KRS 511 - BURGLARY

McGruder v. Com., 487 S.W.3d 884 (Ky. App. 2016)

FACTS: On March 14, 2013, a **"**neighbor witnessed a man smoking a cigarette inside a house that the neighbor knew was unoccupied at the time." (The owner of the house had purchased it in December 2012 and was in the midst of renovating it before moving in.) The neighbor called police, who arrived at the house shortly thereafter." Officers spotted the suspect inside and they were finally able to get inside; they found McGruder hiding in the attack. They also found a backpack full of items belonging to a female, Schureck, and it was determined it had been stolen from her the day before. It also included McGruder's ID and other items, including a small hatchet.

McGruder was charged with Burglary 1st and related offenses. He was convicted and appealed.

ISSUE: Is a small hatchet a deadly weapon?

HOLDING: No

DISCUSSION: McGruder argued that the hatchet could be considered a "deadly weapon" under the statute. The trial court had noted that "while acknowledging that a hatchet is not explicitly included in the statutory definition, the trial court nevertheless answered that question in the affirmative by analogizing the small hatchet—it "being an object that can cut, chop, slice, dice, [and] cause great physical harm"—to a knife (which is expressly included in the statutory definition provided below).

However, the Court continued:

> … because the question here is one of statutory interpretation, which of course is a matter of law, we owe no deference to the trial court's interpretation.[23] Instead, we "must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent." So, to answer the question presented, we must begin with the penal code's general definitions section, KRS 500.080, which provides that a "deadly weapon" is any of the following: (a) A weapon of mass destruction; (b) Any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged; (c) Any knife, other than an ordinary pocket knife or hunting knife; (d) Billy, nightstick, or club; (e) Blackjack or slapjack; (f) Nunchaku karate sticks; (g) Shuriken or death star; or (h) Artificial knuckles made from metal, plastic, or other similar hard material.[24] As Professors Lawson and Fortune have explained, the concept of "deadly weapon" as used in the Penal Code generally embraces "a device that is designed to be a weapon and has no other obvious usefulness.[25]" Nonetheless, while that is an apt generalization, the statute expressly lists the items that constitute deadly weapons, without relying on a general definition. This can be contrasted with the Penal Code's related concept of "dangerous instrument," which is "any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury."[26] Or, stated more succinctly, it is "a device that is readily capable of causing death or serious bodily injury by the manner of its use *but without having been designed to serve that purpose."*[27] The juxtaposition of these two concepts makes clear that the primary characteristic distinguishing one from the other is the purpose or usefulness for which the particular item was designed. Deadly weapons (or, simply, weapons in general) were designed for that singular purpose: to be a weapon. Dangerous instruments, on the other hand, were not designed to be weapons, though they might be readily capable of being

[23] *E.g.,* Com. v. Plowman*,* 86 S.W.3d 47 (Ky. 2002).
[24] KRS 500.080(4).
[25] Robert G. Lawson & William H. Fortune, Kentucky Criminal Law *§* 9-2(a)(3), at 367 (1998).
[26] KRS 500.080(3).
[27] Lawson 86 Fortune, supra*, §* 9-2(a)(3), at 367 (emphasis added).

used as such; instead, they were designed to complete any number of non-violent tasks, such as hammering nails or chopping wood.

The Court agreed that other items could still present a danger, and would be categorized as dangerous instruments when they were "weaponized." The Court noted that "this makes complete sense for the exact reason that such instruments, including the small hatchet in this case, are not weapons per se and should only be treated by the Penal Code as weapons when the offender makes use of them as such."

Further:

> Based on the plain meaning of the statutes at issue and the legislative intent, then, it is clear that the small hatchet found to have been in McGruder's possession is at most a dangerous instrument, not a deadly weapon. A hatchet is not among the weapons listed in the definition of *deadly weapon.* That statutorily defined term cannot be expanded by analogy, as proposed by the trial court. The General Assembly expressly limited the types of implements that can constitute deadly weapons, and relegated others to the category of dangerous instruments, depending on their use and potential for danger. Indeed, this case perfectly illustrates the rationale underlying the burglary statutes' varying offense levels depending on aggravating circumstances. Had McGruder, for instance, wielded the hatchet threateningly towards the police or neighbors during the burglary or even used it against them, then the dangerousness of that aggravating factor would warrant convicting him of the higher crime. But since there is no proof that he did anything of the sort, but instead merely had the hatchet—a dangerous instrument to be sure, but not a deadly weapon—in his possession at the time he was unlawfully in the building, there is no justification for the stiffer penalty because his actions did nothing to demonstrably increase the dangerousness of the crime.
>
> Finally, the fact that our holding here is necessarily constrained by the plain meaning of the statute is why Lyon v. Com. [28], has no bearing on our decision. The Commonwealth contends that, because that case noted that "[c]ertain instruments such as ... a hatchet ... have been held as a matter of law to be deadly weapons," it should instruct our analysis here. But the development of "deadly weapon" as a common-law term of art became largely irrelevant following the 1974 enactment of our present Penal Code, as the General Assembly thus expressly codified the meaning of the term as used in the code. It is the statutory definition, as construed according to its plain meaning, that controls, not how that term may have previously been construed. We thus conclude that a hatchet is not a deadly weapon as a matter of law. Therefore, it would be clearly unreasonable for a jury to find that McGruder was armed with a deadly weapon while in the building solely by virtue of his having been in possession of a small hatchet at that time. As such, the trial court erred in denying his motion for a directed verdict on the first- - degree burglary count and that conviction and sentence must therefore be reversed and the case remanded to the Jefferson Circuit Court, where he may be tried for a lesser degree of burglary.

McGruder's conviction for Burglary was reversed but his other conviction for Receiving Stolen Property was affirmed.

Williams v. Com., 486 S.W.3d 291 (Ky. 2016)

FACTS: Montgomery died from a shotgun blast to the chest, his body discovered the next day by a neighbor. Two years later, Hill came forward to police, implicating Williams. Both Montgomery and Williams were involved in drugs, and Montgomery had become a CI. He testified against Williams and "Williams, according to his friends, pledged to get revenge for this perceived betrayal." Hill was drinking with Williams on night and during that time, Williams decided it was time to kill Montgomery. "

Williams retrieved his shotgun, a handful of shells, and a change of clothes; and the two set out for Montgomery's house in Williams's automobile. They arrived about 3 a.m. Montgomery allowed them in

[28] 239 S.W. 1046 (Ky.1922).

and an argument ensued. They were ordered from the house and Williams grabbed the shotgun, and shot Montgomery. Aarons was hiding in a nearby room the entire time.

Williams was charged with Murder, Tampering and Burglary 1st. He was convicted and appealed.

ISSUE: Is a homicide a reason to presume that the subject refused to leave, before committing the homicide, creating a Burglary situation?

HOLDING: Yes

DISCUSSION: Williams argued that the Burglary 1st charge was improper and that it wasn't proven that he entered or remained unlawfully. The Court noted that:

> An individual may be convicted of first-degree burglary when, "with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom," he is armed with a deadly weapon, causes physical injury to a person, or uses or threatens the use of a dangerous instrument against a person. Williams argues the Commonwealth failed to present any evidence that Williams entered Montgomery's residence unlawfully, entered it with a shotgun, or remained unlawfully in it with the intent to commit a crime.

The Court agreed that he was invited in, but that was not the issue, instead, it was the "remaining" that was shown. Further, although Hill actually carried the shotgun in, all that was required was that a participant was armed. In addition, Hill entered carrying it, but Williams left with it.

> Finally, William argues he did not remain unlawfully with the intent to commit a crime because he was invited inside and Montgomery did not revoke the license because he was murdered. Williams cites Wilburn v. Com., the liquor-store-robbery case, as support for his argument. The problem with this is rather simple: the Commonwealth presented evidence that Montgomery explicitly revoked Williams's license to be in his home and Williams remained inside. No such evidence was presented in Wilburn—*in* that case, attempting to fend off the attempted robbery, the shop owner promptly fired a gun at the defendant, an action we construed as the functional equivalent of a demand to leave the premises. The defendant left immediately after the shots were fired, thereby not remaining unlawfully. The instant situation does not involve such implicit revocation. Evidence was offered that Montgomery arose from the couch, told Williams and Hill to leave his home, and, unlike the defendant in Wilburn, Williams and Hill did not leave. Instead, Williams shot Montgomery in the chest. A directed verdict was not warranted because it was not unreasonable for a jury to find Williams guilty of burglary given the evidence.

With respect to Tampering, "the sawed-off shotgun used to murder Montgomery was discarded in a field between Montgomery's and Williams's residences. For years the weapon went undiscovered. When Hill came forward and assisted in the investigation, he led police to the shotgun, by then rusted and concealed by overgrown weeds. Williams alleges the Commonwealth did not present sufficient evidence to warrant a tampering-with-physical-evidence conviction because there was no proof Williams concealed the weapon. The Commonwealth concedes the evidence was circumstantial but argues the evidence was adequate nonetheless." The Court noted that Williams apparently owned the gun and was in possession of it most of the time, and that he fled with it and tossed it. Although it was simply hidden in weed, and that "Williams did not bury the gun underground or otherwise camouflage the weapon in some way, but we are unsure what import this has on the sufficiency of the Commonwealth's evidence. Williams flung the gun into a field of weeds that hid the weapon from view. Would Williams's argument be different if he had thrown the gun in a trash can or lake? The evidence tended to prove that Williams was responsible for the shotgun being out of *sight*— *conceal* is defined as "to hide; withdraw or remove from observation; cover or keep from sight."

The Commonwealth's evidence was sufficient to defeat a motion for directed verdict and the Court upheld his conviction.

PENAL CODE – KRS 514 - THEFT

Com. v. Young (Michael and Janie), 487 S.W.3d 430 (Ky. 2016)

FACTS: When Janie Young became pregnant with her fifth child, she and her husband decided they would terminate their parental rights and allow the child to be adopted. They had previously allowed their fourth child be adopted by the Scholens. They contracted with an out-of-state company to find adoptive parents and received approximately $4,000 in payments for prenatal expenses. However, they were also in discussions with the Scholens to adopt the expected baby and accepted over $6,000 for prenatal expenses. Neither the Scholens nor the adoption company were aware of the negotiations with the other. In February, 2010, Janie Young left a message for the Scholens, telling them they could adopt the baby if they repaid the other company for the costs. In another message, she told the Scholens that she'd given birth to a girl (rather than the expected boy), and that her husband did not wish to go forward with the adoption.

In March, the Scholens reported what had happened to KSP and the Youngs were subsequent indicted for Theft by Deception over $10K – with the total money of both the Scholens and the adoption company being aggregated. The Youngs moved to dismiss, arguing that since there was not (and could not be) any agreement to "sell" the child, the money was a gift. When that was denied, the Youngs took conditional guilty pleas and appealed. The Kentucky Court of Appeals ruled that no crime had occurred and dismissed the case. The Commonwealth appealed.

ISSUE: Could a fraud case be made for pre-birth expenses, if the facts suggest actual fraud?

HOLDING: Yes

DISCUSION: The Court acknowledged that this was a unique situation and that because children are precious, even priceless, KRS 199.590(2) prohibits the sale of children. But, the Court noted, since the desire to have a family is so strong and adoption exists to fill that need, and because "the people willing to adopt are often almost desperate to do so," they are "particularly susceptible to deception and fraud." The Court noted that almost all states permit a payment to the mother to support living expenses, including Kentucky, and provides for after-payment reviews of such living expense arrangements. (The Court noted that this "smacks of closing the barn door after the horse has escaped. If there has been overpayment, there is likely no remedy for the prospective adoptive parent.") Further such pre-arranged private adoptions must be voluntary and informed, and a minimum of 72 hours must pass after birth before it can be formalized. It becomes final after twenty days. In other words, "an expectant mother cannot make a binding agreement to allow prospective adoptive parents to adopt her child before the child is born." Living expenses during pregnancy obviously arise during that time and if prospective adoptive parents pay them, there is no guarantee that they will end up adopting the child. This prevents "selling" a baby, because the birth mother is not compelled to go forward with the adoption." The Court noted, however, that "there are no checks and balances on how much money prospective parents can pay" pre-birth, and no way to verify it either. "This rudimentary accounting of the prepaid living expenses could actually be no more than a nod and a wink to the notion that a child has not been sold."

The Court noted that "If there is fraudulent intent by the biological parents, or if they otherwise deceive the prospective adoptive parents, the biological parents have seldom been held accountable in any way. That is why this is a case of first impression in Kentucky. Indeed, only a few such cases have been prosecuted on this conduct at all."

The Court looked to the statute, KRS 514.040, and noted that the deception arose when the Scholens believed they were the only family seeking to adoption. Although there was no obligation to require the adoption go forward, the Court agreed there was clearly enough to allow the case to proceed to trial. Even though the money could be characterized as a gift, it could still be a theft by deception. However, the Court noted, the Youngs could not be charged with the over $10k provision, and that it was improper to aggregate the two amounts, since it involved different victims and were thus separate crimes.

The Court upheld the denial of the dismissal, but also set aside the plea due to the issue of the level of felony to which they should be subjected.

PENAL CODE – KRS 515 – ROBBERY

Hatton v. Com., 2016 WL 2604806 (Ky. 2016)

FACTS: On November 28, 2012, Curtis (age 79) and her daughter stopped at a gas station. Curtis was in line behind Hatton, holding her wallet, and "Hatton turned around and grabbed her wallet." Curtis tried to hold onto it and called for help, as Hatton wrested it from her hands. He ran out, with Curtis and two customers, chasing after him.

> Outside, Hatton ran to a nearby parked car and got in on the passenger side. Curtis and Zikos arrived at the vehicle before the driver, Crystal Boggess, could pull away. They opened the driver-side door, and Curtis positioned herself in the open door, trying to pull Boggess from the car, while Zikos reached in from outside the door and tried to remove the keys from the ignition. Saylor tried to open the handle-less passenger-side door, but was unsuccessful. (Boggess had opened the door for Hatton from the inside.) In the meantime, Curtis's daughter, having been roused by the commotion, drove her car in front of Hatton's to block its departure. There is some dispute over what happened next, but it is undisputed that, in the midst of fending off Curtis's attempts to pull her from the vehicle through the open driver-side door, Boggess drove the car in reverse five to seven feet or so and backed into an air pump. The parties dispute whether Boggess did this on her own accord or at Hatton's directions. In any event, in the process of backing up, the car's open door knocked Curtis to the ground and dragged her several feet. She sustained injuries to her head, neck, and torso, as a result. After Boggess knocked Curtis down and backed into the air pump, she drove the car forward, striking Curtis's daughter's car before escaping the station. Surveillance cameras captured the entire episode on video.

Hatton removed the cash and tossed the wallet out. They abandoned the car and used the money to buy drugs. Hatton was arrested and charged with Robbery 1st. He was convicted and appealed.

ISSUE: Is an injury that is caused during the course of a Robbery enough to raise it to the level of First Degree for the participant who did not directly cause the injury?

HOLDING: Yes

DISCUSSION: Hatton argued that he should have gotten a directed verdict as he did not cause Curtis's injury. Instead, he noted, Boggess caused the injuries. The Court noted:

> First, it is clear that the injuries were inflicted as part of the overall robbery, even though they occurred after Hatton snatched Curtis's wallet and fled. The evidence here established that Hatton stole Curtis's wallet by wresting it away from her, thus committing a robbery, i.e., theft through the use of physical force.[29] And the events that followed—Hatton's running from the store and entering the waiting car, Curtis's and the witnesses' pursuit and opening of the driver-side door to prevent his and his accomplice's escape, and Boggess's backing up and injuring the victim—all occurred in furtherance of that robbery and thus were part and parcel of the offense. What occurred in the immediate flight and escape from the robbery inside the store was an extension of the robbery, rather than a series of separate and distinct events subsequent to the robbery.[30] (holding use of physical force to escape from a completed theft satisfies "in the course of committing theft" requirement). They were necessary for the robber and his accomplice to make their escape with the pilfered goods in their possession. Second, even though Hatton was not the driver, he can nevertheless be viewed as having caused Curtis's injuries for purposes of a

[29] *See* KRS 515.010 (defining "physical force" as meaning "force used upon or directed toward the body of another person").
[30] *Cf.* Mack v. Com., 136 S.W.3d 434 (Ky. 2004).

first-degree robbery conviction. This Court has held that "a mere division of labor between robbers in the commission of the crime does not preclude conviction of each as a. principal."[31] And, in an 5 unpublished case, we have addressed facts almost identical to those in this case.[32]

In this case, "Hatton was the perpetrator of most of the robbery, and he was certainly present when Curtis was injured (and there is evidence that he commanded Boggess to drive when Curtis was still reaching into the car, which led to the injuries). Hatton's participation in the robbery that resulted in Curtis's injuries was thus sufficient to avoid a directed verdict on the count of first-degree robbery. In sum, there was sufficient evidence for the jury to find Hatton guilty of Robbery 1st beyond a reasonable doubt. Accordingly, the trial court was correct to deny his request for a directed verdict."

Hatton's conviction was affirmed.

PENAL CODE – KRS 519 – TAMPERING

Beauchamp v. Com., 2016 WL 1627478 (Ky. App. 2016)

FACTS: On October 21, 2013, Beauchamp was stopped on suspicion of drug trafficking. He was charged with, among other things, tampering with physical evidence for swallowing evidence. Before his trial, the prosecution gave notice under KRE 404(b) that it would introduce evidence of a prior tampering conviction to prove an absence of mistake. At trial, Det. Buemi (Campbell county Drug Task Force.) testified as to the details of that case. The jury was admonished as to how it could use that evidence. He was convicted and appealed.

ISSUE: Is swallowing the evidence always tampering with physical evidence?

HOLDING: No

DISCUSSION: The Court looked at the crime and noted that tampering could occur with the evidence still on the subject's person, as it was in this case. However, when the evidence in question is also the core of the underlying criminal act, in which "the tampering may be simply a continuation of the original criminal act or it may have been the defendant's intent to separate from the incriminating evidence, not specifically to destroy or conceal evidence to prevent its use in a subsequent criminal proceeding."

In this case, the Court agreed, "Beauchamp was charged with a felony for destroying or concealing evidence that would support only a misdemeanor conviction." KRE 404 provides a strict prohibition against using prior convictions, with only limited exceptions. As such, "when offered to prove intent, a prior conviction is admissible only when intent is a genuine issue."[33] Since he denied any intent, it was an issue, but the Court agreed, the prior conviction was irrelevant and as such, it should not have been admitted.

The Court reversed Beauchamp's conviction.

PENAL CODE – KRS 524 – INTERFERENCE WITH JUDICIAL ADMINISTRATION

Hammond v. Com., 2016 WL 3371054 (Ky. 2016)

FACTS: Along with Pettway (tried separately), Hammond was accused of murdering a witness in a case, Sheckles, to prevent her from testifying. (Hammond's younger brother was accused, and ultimately convicted, of murder in that case.) He was convicted of Murder and Complicity to Intimidate a participant in the legal process. He appealed, arguing he could not be convicted of both, as in fact,

[31] Com. v. Smith, 5 S.W.3d 126 (Ky. 1999).
[32] *See* Johnson v. Com., 2003-SC-0925-MR, 2005 WL 2045480, at *1 (Ky. Aug. 25, 2005).
[33] Walker v. Com., 52 S.W.3d 533 (Ky. 2001).

Pettway was successful in arguing. The Court agreed, reversing his conviction on that charge, and the Commonwealth appealed.

ISSUE: Is simply being present in the courtroom during a witness's testimony enough to be intimidation?

HOLDING: No

DISCUSSION: The Commonwealth argued that Hammond's case was different than Pettway, and that he'd actually interfered in some way with Sheckles appearing in court. (She had disappeared for a period of time and because she was an indispensable eye witness, the Commonwealth could not move forward on the case.) The Court noted that "Sheckles' aversion to appearing as a key eye witness in a murder case is not entirely unique," and not enough to convict him of intimidating. As in Pettway's case, there was no evidence that he intimidated Sheckles prior to the murder itself, and evidence of Hammond's presence in the courtroom during prior proceedings was insufficient.

The Court also looked to alleged discovery violation, with the prosecution failing to provide required investigative material, potentially exculpatory, to the defense. As a result, the trial judge had ordered the prosecution to turn over the entire police file, an "extraordinary remedy," and the Court considered that sufficient.

The Court upheld the reversal of the intimidating conviction.

Jackson v. Com., 487 S.W.3d 921 (Ky. App. 2016)

FACTS: On March 22, 2012, Jackson allegedly had an altercation with his pregnant girlfriend, DeMoss, and prevented her from calling the police. (He also allegedly hit her with his car.) At trial, DeMoss testified at length about the altercation and how he grabbed two different phones from her hand, her own and her neighbor's, to prevent her from calling. However, when the police arrived initially, she said she was alright and did not wish a report. "

> She called the police back after she realized that Jackson was not planning to return. She made a full report to one of the responding officers while another officer took photographs. [DeMoss] was checked out at the police station, but she did not receive any medical treatment. The injury to her knee was the extent of her injuries. [DeMoss's] father met her at the police station, and he took her back to his house that night. She was interviewed by a police detective one week later at the Clarksville Police Station, where her father worked as a detective.

Det. DeMoss, her father, testified that he'd picked his daughter up at the station that night and that he did not believe she was under the influence at the time. Det. DeWitt testified he went to the home twice and corroborated Shaina's story. Det. Heselschwert interviewed Shaina a week later.

Jackson was charged with several offenses, including Criminal Mischief, Assault 4th and Intimidating a Witness – for snatching the phone from DeMoss's hand, twice. Jackson's version, to which he testified, indicated that Shaina was the aggressor. He denied taking the phone or hitting her with the car. He had photographs of extensive damage in his apartment, which he claimed Shaina caused, including his clothing doused in bleach, water left running that flooded an adjacent apartment, and smashed furniture. A witness, however, testified that Jackson did seize the phone (the neighbor's phone) and that he broke the phone and battled with Shaina. (Jackson later apologized to the neighbor and stated Shaina had damaged a great deal of his property.)

Jackson was convicted of second-degree criminal mischief, one count of intimidating a participant in the legal process, and fourth-degree assault. The jury found him not guilty of first- or second-degree wanton endangerment, first-degree criminal mischief, and one count of intimidating a participant in the legal process. He appealed.

ISSUE: Is a person a participant in a legal process if they can reasonably be expected to be a participant?

HOLDING: Yes

DISCUSSION: The Court looked at Intimidating a participant, KRS 524.040. Jackson argued at that the time, he could not have known Shaina was a "participant" – based on Moreland v. Com.,.[34] A similar ruling was in the case of Barefield v. Com.,[35] citing Moreland and the rule of lenity. However, the Court noted that Edmonds v. Com., essentially reversed the Moreland case, and holding that "an official proceeding need not be pending or about to be instituted at the time of the offense."[36] In Edmonds, the Court stated "As a matter of policy, if the legal process *could* be invoked, and a defendant intends to prevent a victim from participating in the legal process, then this statute can apply." The Court clarified that "the legal process" did not mean any particular case, but the legal system as a whole. The Court noted that at some point, the participant may become a "witness," who may be called to testify.

The Court emphasized that since DeMoss, "

> As such, the Court agreed, Shaina was a participant when she attempted to call the police and was prevented. (Further, although the original situation occurred before Edmonds was rendered, his conviction was not yet final until after Edmonds was handed down, and thus could be applied.[37] the victim, was a participant in the legal process when she called 911 to report Jackson's actions. Seizing the phone certainly "hindered or delayed" her attempt to communicate with the police.

The Court affirmed his conviction.

PENAL CODE – KRS 530 - INCEST

Miles v. Com., 2016 WL 1558151 (Ky. 2016)

FACTS: A.C., Miles's daughter, lived with him in Michigan until late summer, 2012, when they moved to Kentucky. In October, she told a school counselor that her father had been sexually abusing her for some time. Upon an exam, she was found to be pregnant and the pregnancy was terminated. A DNA test indicated that Miles was the father of the fetus. Miles was charged with Incest and Sexual Abuse, and related charges. He was convicted and appealed.

ISSUE: Is evidence of pregnancy relevant in an Incest case?

HOLDING: Yes

DISCUSSION: Miles argued that the pregnancy, abortion and DNA test should have been excluded and that the timing indicated that the only sexual intercourse that occurred in Kentucky purportedly took place in early October. Since the evidence indicated there had been a fetal heartbeat at the time of the abortion, in October, he argued, that she could not have gotten pregnant in Kentucky. There had been no evidence either way as to the possible gestational age of the fetus. The Court agreed that as such, the evidence of her pregnancy, and the consequences, was relevant.

The Court also looked at the admission of a videotaped recording of the police recording in which the officers "accused Miles of lying, of being a monster, of being horrible and of having an illness." Officers who testified also "bolstered A.C.'s testimony by stating that the DNA test results proved that Miles was the father of A.C.'s fetus and that A.C.'s statements to police were true." Although the court agreed that

[34] 322 S.W.3d 66 (Ky. 2010).
[35] No. 2011-CA-001851-MR, 2013 WL 2450529 at *3-4 (Ky. App. June 7, 2013),
[36] 433 S.W.3d 309 (Ky. 2014),
[37] Griffith v. Kentucky, 479 U.S. 314 (1987).

the "interrogation contained statements adverse to Miles and supportive of A.C., it is not probable that the result of the trial would have been different absent the admission of same."

Miles' conviction was upheld.

FORFEITURE

Van Berg v. Com., 2016 WL 3147573 (Ky. App. 2016)

FACTS: Following the Daviess Circuit Court finding that there was "more than a preponderance of evidence to believe Van Berg had used the Corvette to transport and deliver methamphetamine she then transferred1 to a confidential informant on January 12, 2006," the Court ordered her Corvette forfeited. In this case, however, timing was crucial, as the Corvette was seized in 2006 but the Commonwealth didn't move to seize it until 2014, despite the fact that KRS 413.120(3) establishes a five year window. Her conviction became final in 2010. She appealed the forfeiture.

ISSUE: Is a conviction a prerequisite to forfeiture?

HOLDING: No

DICUSSION: Van Berg argued that "a conviction is not a prerequisite to forfeiture[38]" and thus the Commonwealth could have moved more quickly. The trial court, however, found that the time began to accrue when the case became final, in 2010, and thus, the seizure was timely. However, the Court of Appeals found that not to be the case, and that the appropriate start day for assessing it was 2006, when the case began. The Court ordered the vehicle returned.

DUI

Riffe v. Com., 2016 WL 1272947 (Ky. App. 2016)

FACTS: Riffe was stopped for speeding (93 in a 70 mph zone) He failed FSTs and refused the Intoxilyzer, upon the advice of his attorney. At his arraignment, he was given a pretrial suspension. At trial, he was convicted of speeding but acquitted of DUI. (He pled guilty to other minor traffic offenses as well.) He asked to have the license suspension vacated but the District Court ruled that the statutory penalty for refusing the breath test applied. The Court reviewed his extensive driving record, including two prior DUIs and numerous "extreme speeding" citations. The Court suspended his OL for 36 months. Riffe appealed to the Circuit Court, which affirmed. Riffe further appealed.

ISSUE: Must a challenge to a license suspension (due to a DUI refusal) be done immediately?

HOLDING: Yes

DISCUSSION: The Court noted that on the day of his acquittal, Riffe left the courthouse knowing that his license was suspended, he simply did not know how long it would last. The Court agreed that upon a finding of a refusal, either with a hearing or not, a suspension was warranted, no matter the acquittal. The Court had asked both sides to research the procedure, but the defense focused on shortening the suspension, not in convincing the court it lacked authority. The Court agreed that "a refusal is an entirely different animal carrying its own penalty." The Court agreed that there was no time frame required to request a hearing, if one is needed. The research indicated that the length of the suspension was properly decided.

The Court affirmed the suspension.

[38] Osborne v. Com., 839 S.W.2d 281 (Ky. 1992)

Perry v. Com., 2016 WL 1627856 (Ky. App. 2016)

FACTS: Perry was involved in a fatal crash in Martin county during which he was driving under the influence of prescription drugs. He was convicted of Manslaughter and appealed.

ISSUE: Does a valid consent justify a blood draw?

HOLDING: Yes

DISCUSSION: Perry first argued that his blood test results should have been suppressed, despite the fact he signed a consent form to have the blood drawn. As there was no evidence he had been coerced or tricked, or was otherwise unable to give a valid consent, the Court found the consent valid.

Perry also argued that his trial counsel should have moved to suppress the toxicology report, obtained as a result of the blood draw. The blood draw showed therapeutic levels of several prescription drugs, apparently legally taken, but there was also evidence that taken together, they could make it unsafe to drive. (He also admitted to smoking marijuana.) The Court agreed that the attorney's decision was trial strategy, not ineffective assistance, and upheld his convictions.

SEARCH & SEIZURE – SEARCH WARRANT

Taylor v. Com., 2016 WL 2605296 (Ky. 2016)

FACTS: On September 27, 2012, Sergeant Hansen, along with Officers Willis and Fuller (Bowling Green PD) "responded to the Taylor residence to investigate a report of alleged sexual abuse." They had been notified by Petty "that her nieces, 'Melissa' and 'Carol' had disclosed to her that they had been sexually abused by their father, Taylor." Their mother, Charlotte Taylor, told Officer Willis "that Melissa had informed her a month prior that Taylor had taken pictures of Melissa wearing lingerie."

> During a brief interview, Melissa confirmed to Officer Willis that Taylor had taken photos of her in lingerie and video recorded her and Carol while they were bathing. Consequently, the police obtained consent from Charlotte to search the residence for the video camera that Taylor had allegedly used to record sexually explicit images of their children. Simultaneously, Detective Jason Franks of the BGPD was able to locate Taylor. Taylor informed Detective Franks that he had an argument with Charlotte earlier in the day and that he left the residence as a result. During their conversation, Detective Franks inquired as to whether Taylor owned a video camera and Taylor admitted that he owned a camera and that he believed it was located on a shelf in a closet at home. Subsequently, Detective Franks obtained consent from Taylor to search his residence for the camera.

During the search, however, they did not find the camera, but did find other items which could hold recordings, and they seized "two desktop computers, five cellular telephones, a digital camera, a secure digital (SD) memory card, and a Video Home System (VHS) videotape." Det. Lemon obtained consent from Charlotte to examine the items, but was told one of the computers belonged to Taylor and she could not give consent for it. Taylor refused, so the detective got a search warrant. A forensic exam revealed sexually explicit photos of Melissa.

Taylor was charged with Use of a Minor in a Sexual Performance (16 counts). He moved to suppress and was denied. Taylor took a conditional guilty plea to a number of charges.

ISSUE: May any inhabitant in a house give consent?

HOLDING: Yes

DISCUSSION: First, the Court looked at the search of the residence, which Taylor conceded was after Charlotte gave consent.

> The police were rightly able to rely on Charlotte's consent to search as she was an inhabitant of the residence. “it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area be searched."[39] Additionally, there was evidence presented during the suppression hearing that Taylor also granted consent to the police to search the residence.”

Next, it was proper to seize the computer, which affected only Taylor’s possessory interest, not his privacy interest. As such, the “U.S. Supreme Court has interpreted the Fourth Amendment to permit seizure of property, pending issuance of a warrant to examine its contents, if law enforcement authorities have probable cause to believe that the container holds contraband or evidence of a crime.[40] Additionally, "probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[41]” The police had more than enough probable cause to seize the computer since it was logical that photos could be found on it. With respect to the warrant, which Taylor claimed was flawed, the Court looked to the affidavit itself.

The portion of the affidavit at issue states as follows:

> *The affiant located Henry Taylor at his place of employment. He agreed to talk to the affiant. He advised the affiant that he had previously given officers permission to search his belonging (sic). He advised that he did not object to the search but wanted to talk to his attorney before he allowed a forensic examination of the items located by the officers.*

At the suppression hearing, the Detective explained further and the Court agreed that his testimony did not contradict the affidavit at all, and this omission of talking to Charlotte was not error.

> To begin, it is understood that affidavits prepared in support of search warrants "are normally drafted by non-lawyers in the midst and haste of a criminal investigation."[42] Additionally, a law enforcement officer cannot be expected to include in the affidavit every detail of their investigation.[43]
>
> Taylor has failed to make the requisite showing that Detective Lemon omitted his conversation with Charlotte with the intention of making the affidavit misleading. Rather, Taylor simply notes that the conversation was omitted from the affidavit, without advancing any additional facts or argument that would explain how this made the affidavit misleading. Further, Taylor is unable to demonstrate that the affidavit supplemented by the omitted information, would not have been sufficient to support a finding of probable cause. The omitted conversation was not material and its inclusion would not have affected the probable cause determination.

The Court affirmed Taylor’s convictions.

Campbell v. Com., 2016 WL 1557601 (Ky. App. 2016)

FACTS: During the early morning hours of September 20, 2014, Officer Embry (Morgantown PD) stopped a vehicle. Couch was the driver. Several baggies of methamphetamine were found. He later told Det. Gibson that where he’d purchased the drugs and identified the seller as Jarvis. After verifying the location and the drugs, Gibson obtained a search warrant, detailing the information. Upon a search a quantity of methamphetamine, scales, cash and a handgun were found. Campbell and another person were at the house, and were arrested.

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[39] U.S. v. Matlock, 415 U.S. 164 (1974); *see also* Payton v. Com., 327 S.W.3d 468 (Ky. 2010) (spouse could consent to search of the martial residence which resulted in seizure of evidence from shared master bedroom).
[40] U.S. v. Place, 462 U.S. 696 (1983).
[41] U.S. v. Wright, 16 F.3d 1429 (6th Cir. 1994) (quoting Illinois v. Gates, 462 U.S. 213 (1983)).
[42] U.S. v. Ventresca, 380 U.S. 102 (1965).
[43] U.S. v. Colkley, 899 F.2d 297 (4th Cir. 1990).

Campbell was charged and moved for suppression. At the hearing, Det. Gibson testified but Campbell did not. Campbell argued that there was insufficient probable cause because the detective "did not perform a sufficient investigation to corroborate the information provided." When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Does Kentucky use the totality of the circumstances approach in assessing probable cause for a warrant?

HOLDING: Yes

DISCUSSION: The Court agreed that "to satisfy the Fourth Amendment, search warrants must be supported by probable cause.[44]

> In Beemer v. Com.,[45] Kentucky adopted the totality of the circumstances approach adopted by the U.S. Supreme Court in Illinois v. Gates to determine whether probable cause exists.[46] As described in *Gates*, probable cause is a "practical, commonsense decision" that "given all the circumstances set forth in the affidavit" there is "a fair probability that contraband or evidence of a crime will be found in a particular place." "It is the duty of the judicial officer to issue or deny the warrant based solely on the facts contained within the four corners of the affidavit."[47]

To review a ruling, the Court looked to Com. v. Pride,[48] which states:

> "First, review the factual findings of the circuit judge to see if they are supported by substantial evidence . . . and then review the ruling on the motion to suppress *de novo* to see whether the decision was correct as a matter of law." There is no dispute as to the facts presented by the Commonwealth or as found by the circuit court. The question is whether the decision that the facts stated in Detective Gibson's affidavit were sufficient to establish probable cause upon which to issue the search warrant was correct as a matter of law.
>
> While an informant's veracity, reliability, and basis of knowledge are all "relevant considerations in the totality of the circumstances analysis," they are not conclusive and "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." In making a probable cause determination there must be "a balanced assessment" of the relative indicia of reliability accompanying an informant's tip. "Typically, a bare and uncorroborated tip received from a confidential informant, without more, would be insufficient to establish probable cause for a search warrant."[49]
>
> However, further investigation is not always required when the informant is known and the indicia of reliability heightened. "[A]n explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles the informant's tip to greater weight than might otherwise be the case." In cases involving identifiable informants who could be found if the information was determined to be unfounded or fabricated, such information is entitled to a greater "presumption of reliability" as opposed to the tips of unknown "anonymous" informants.[50] Additionally, "[s]tatements against the informant's penal interest also increase the degree of veracity that a court may attribute to the statements." As noted in Lovett, the U.S. Supreme Court explained, that "[p]eople do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against

[44] Minks v. Com., 427 S.W.3d 802 (Ky. 2014).
[45] 665 S.W.2d 912 (Ky. 1984),
[46] 462 U.S. 213 (1983),
[47] Crayton v. Com., 846 S.W.2d 684 (Ky. 1992).
[48] 302 S.W.3d 43 (Ky. 2010),
[49] Lovett v. Com., 103 S.W.3d 72 (Ky. 2003).
[50] Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005).

proprietary interests, carry their own indicia of credibility —sufficient at least to support a finding of probable cause to search."[51]

Couch was identified and gave first-hand information. He did not have Campbell's correct name, but gave specific information that consisted of admissions against his penal interest and which bolstered his credibility.

Finding the warrant sufficient, the Court upheld his plea.

SEARCH & SEIZURE – CURTILAGE

Means v. Com., 2016 WL 2639601 (Ky. App. 2016)

FACTS: On the evening of December 10, 2014, police officers from the Winchester Police Department and Clark County Sheriff's Office attempted to serve an arrest warrant on Means at his last known address. However, when the officers arrived at that address, Means' mobile home had vanished. In an attempt to determine where the mobile home was now located, one of the officers contacted a confidential informant ("CI") who, in turn, contacted other unknown individuals and ascertained Means' whereabouts. The CI directed officers to a mobile home park in Winchester, Kentucky and pointed out the trailer known by the CI to belong to Means. The CI warned officers to be careful as there was likely an active methamphetamine lab in the trailer. Means was known to the officers as a flight risk, so one officer proceeded to the rear of the trailer while three approached the front door. Lights were on in the trailer and officers testified they were able to see through and/or around a closed blind on the window directly beside the front door. Means was observed walking back and forth in the trailer. Upon confirming Means was inside, officers knocked on the door, announced their identity, and stated their purpose of serving an active arrest warrant. Two male voices were heard inside the trailer and officers observed the second man flee toward the rear of the trailer.

Means refused to open the front door and leaned against it in an effort to thwart the officers' entry. Ultimately, the door was kicked in and Means was arrested. Once inside the trailer, officers observed multiple items associated with the manufacture of methamphetamine in plain sight. Officers secured the residence and procured a search warrant for the residence. Additional evidence was located during the subsequent search resulting in charges being lodged against Means for manufacture of methamphetamine, first offense

Means moved for suppression, arguing that they "had no reason to believe he was in the trailer, thereby rendering their entry onto the curtilage of the property a trespass, citing Payton v. New York."[52] Means argued the officers further infringed upon his rights when they conducted a warrantless search of his property by "peeking" around the closed window blind. The trial court denied his motion. Means took a conditional guilty plea and appealed.

ISSUE: Is a reason to believe a subject is inside a residence enough to enter with an arrest warrant?

HOLDING: Yes

DISCUSSION: The court looked at Payton and noted that "an arrest warrant founded on probable cause under the Kentucky Rules of Civil Procedure. implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[53]

Means argued that "the arresting officers did not have adequate 'reason to believe' he was within the trailer upon their arrival and only gained such knowledge after trespassing onto the curtilage of his

[51] Id. at 78-9 *(*quoting U.S. v. Harris, 403 U.S. 573 (1971)).
[52] 445 U.S. 573 (1980)
[53] Supra.

property and conducting an unlawful "search" by peeking through the window." The Court noted that ""reason to believe" is established by looking at common sense factors and evaluating the totality of the circumstances and requires a less exacting standard of proof than the probable cause standard urged upon us by Means. The Court emphasized that the Supreme Court clearly knew the difference between the two "yet chose to require separate rules." Instead, the Court agreed, "Under the facts presented in this case, the police officers had a reason to believe—according to common sense factors and evaluating the totality of the circumstances—Means lived at the location and in the trailer identified by the CI and was currently located inside." The Court noted that the officers looked through a partially obstructed window, but testified that "their view inside was not obscured." Nothing extra was required for them to see inside.

> In Quintana v. Com., our Supreme Court noted "certain areas such as driveways, walkways, or the front door and windows of a home frequently do not carry a reasonable expectation of privacy because they are open to plain view and are properly approachable by any member of the public, unless obvious steps are taken to bar the public from the door." If members of the public may approach these areas, police officers conducting legitimate business may likewise enter them.[54]

Further,

> [I]n so doing they "are free to keep their eyes open and use their other senses." This means, therefore, that if police utilize "normal means of access to and egress from the house," for some legitimate purpose, such as to make inquiries of the occupant or to introduce an undercover agent into the activities occurring there, it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.

However, the Court emphasized**,**

> **…** if officers stray from the normal path to the public entrance and enter upon other parts of the curtilage to surreptitiously observe the property or its residents, even the use of the natural senses of sight, hearing or smell to detect what is inside may constitute a search for Fourth Amendment purposes. No such search occurred in this case. Upon their approach to the door of the residence, police heard voices inside, noticed lights illuminated in the main room of the trailer, and clearly viewed Means from their vantage point at or in extremely close proximity to the front door—a location open to the public. These circumstances bolstered their belief Means was inside. In addition, and as the trial court correctly noted, no evidence was presented that officers unlawfully trespassed on Means' property or deviated from their path to the door so as to infringe upon the curtilage of the trailer.
>
> Further, when the officers knocked on the door and announced their presence, they heard the sounds of one of the suspects fleeing to the rear of the trailer before Means called out to them announcing his refusal to open the door. These actions confirmed their reasonable belief Means was inside and wished to avoid contact with law enforcement officers. Such factors clearly constituted a reasonable belief which would permit the officers to constitutionally proceed inside to effectuate the arrest based on the valid warrant. Given these facts, the trial court did not err when it denied Means' motion to suppress.

The judgment of the Clark Circuit Court was affirmed.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

Fields v. Com., 2016 WL 3035556 (Ky. App. 2016)

FACTS: On November 29, 2013, Fields and Couch were using methamphetamine at a Hazard home. A CI notified Officer Couch (no relation) and Campbell, who went to the home. A background

[54] 276 S.W.3d 753 (Ky. 2008)

check indicated Couch had an active arrest warrant. As the officers approached, they spotted Couch look out the window and then withdraw to a back room of the trailer. Granny, the elderly occupant, answered the knock and allowed them inside to arrest Couch.[55] They found her hiding in a closet and Fields sitting on the bed in the same room. He "vociferously ordered the officers out of the room," but they arrested Couch and handcuffed Fields. Granny gave permission for a search, and methamphetamine was found.

Fields was charged with Trafficking, he was convicted and appealed.

ISSUE: May an occasional visitor deny consent to search a residence?

HOLDING: No

DISCUSSION: The Court noted that **"t**here is a factual dispute as to whether Fields was a co-tenant or overnight guest of the property owned by Granny. When officers entered the room in which they found the methamphetamine, Fields claimed that he shared the room with Maudie [Couch] and ordered the officers to leave. Fields insists that he was a co-tenant and his refusal to consent to the search makes the search unreasonable and invalid as to him.[56] The trial court, in its order overruling Field's motion to suppress, specifically found that Fields was not a co-tenant of the trailer home owned by Granny and therefore the search was reasonable based on Granny's consent.[57] The Court based its findings primarily on the testimony of Maudie. Maudie testified that she lived in the trailer home with Granny and Granny's son, and that Fields came to the house that day to visit. Maudie's testimony constitutes substantial evidence that Fields was not a co-tenant." Therefore, the trial court's finding of that fact on that matter is conclusive.[58]

The U.S. Supreme Court has held that a person who is merely present with the consent of the household may not assert a Fourth Amendment right.[59] The Court agreed that it was "clear that Fields has no standing to contest the search of Granny's residence."

The Court, however, reversed his conviction due to issues relating to jury selection.

Berry v. Com., 2016 WL 2894007 (Ky. 2016)

FACTS: Det. Collier (Montgomery County SO) was called to investigate "suspicious garbage" that included what appeared to be one-step methamphetamine labs and Kroger receipts for pseudoephedrine. He was able to identify Berry from Kroger surveillance video as he'd had previous contact with him.

Det. Collier went to the last home associated with Berry to investigate. No one was home but he saw a trash can with bags that were ripped open and spotted a plastic bottle that appeared to be a meth lab. During a subsequent search, three more labs were found. When Berry was arrested, he made an incriminating statement. He was charged with Manufacturing Methamphetamine. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does a frequent visitor have standing to object to a search?

HOLDING: No

DISCUSSION: At the suppression hearing, it was revealed that in fact, the property was owned by a third party who leased it to Berry's girlfriend. Berry did not live there, however, admitting that he lived in Menifee County. He did stay there on occasion and "was in and out of the home quite frequently." The

[55] Note, that was how the elderly occupant was referred to in the opinion.
[56] *See* Georgia v. Randolph, 547 U.S. 103 (2006) (holding that a physically present co-occupant may refuse to consent to the search, which renders the warrantless search unreasonable and invalid as to him or her).
[57] *See* Illinois v. Rodriguez, 497 U.S.177 (1990) (holding that the Fourth Amendment's prohibition against warrantless entry of a person's home does not apply to a situation in which voluntary consent has been obtained).
[58] See Anderson v. Com., 352 S.W.3d 577 (Ky. 2011).
[59] *See* Minnesota v. Carter, 525 U.S. 83 (1998).

Commonwealth argued that he lacked standing – in that he did not have an expectation of privacy at the location.

The Court agreed that even though he was a frequent visitor, pursuant to Ordway v. Com., he did not have an expectation of privacy there.[60] As such, the Court upheld his plea.

SEARCH & SEIZURE – TERRY

Chames v. Com., 2016 WL 2638250 (Ky. 2016)

FACTS: On August 29, 2013, Officers Christian and Craymer (Covington PD) responded to a call that concerning two women selling stolen goods from a vehicle at a location. The officers knew the area was known for high crime and narcotics trafficking. At the location, they found the vehicle with "a group of people around it, including Chames." They were familiar with Chames as a drug trafficker. As Officer Craymer got out of his car, "Chames made eye contact with him, turned and ran down an alley." Of course, the officers chased him, with Craymer on foot yelling at him to stop and Officer Christian in his vehicle. Chames continued to flee.

"While chasing him, Officer Craymer observed Chames pause and crouch over a sewer grate and manipulate a black object." Believing he was disposing of evidence, Officer Craymer drew his gun and ordered Chames to the ground, but instead, Chames fled again. They ran through several yards and climbed fences. Finally, Officer Craymer pulled him down off a fence, as Chames was resisting. He was finally apprehended and searched, and a firearm and marijuana was found.

Chames was charged with several crimes, and ultimately indicted for being a felon in possession. He moved for suppression, and the court noted "there was no dispute as to the facts surrounding the police officers' encounter with Chames; there was only a dispute as to the legal ramifications of those facts in whether there was reasonable suspicion or probable cause." The Court denied the motion. Chames was convicted and appealed.

ISSUE: Is fleeing from the police evidence of guilt for a Terry stop?

HOLDING: Yes

DISCUSSION: The Court agreed that "while an individual's mere presence in a high crime area is not sufficient for reasonable suspicion," proof of flight from police is "some evidence of a sense of guilt."[61] Further, in Illinois v. Wardlow, the Court had agreed that fleeing was enough for reasonable suspicion.[62]

In Chames' case, there was even more, as he was also in close proximity to the vehicle that brought the officers to the scene and both officers were familiar with Chames. He attempted to dispose of something, and failed to stop even when guns were drawn on him. They officers were further justified in doing a frisk.[63]

The court further agreed that his arrest was justified – with the initial charges being Criminal Trespassing 2nd and Fleeing and Evading 2nd, both committed in the presence of the officers. As such, the search was proper under search incident to arrest, as well.[64]

The Court affirmed his plea.

[60] 352 S.W.3d 584 (Ky. 2011). See also Hawley v. Com., 435 S.W.3d 61 (Ky. App. 2014).
[61] Strange v. Com., 269 S.W.3d 847 (Ky. 2008); Rodriguez v. Com., 107 S.W.3d 215 (Ky. 2003); Hord v. Com., 13 S.W.2d 244 (1928).
[62] 528 U.S. 119 (2000).
[63] Terry v, Ohio, 392 U.S.! (1968)
[64] Owens v. Com., 291 S.W.3d 704 (Ky. 2009).

Splawn v. Com., 2016 WL 2638239 (Ky. App. 2016)

FACTS: On February 12, 2014, Splawn was a passenger in Mock's vehicle. At about midnight, Officer Holliday (Lebanon PD) encountered the vehicle "stopped in the middle of a street, blocking both lanes." The car was running with the headlights on, and had an out of state plate. The area was known for high crime and a male subject was standing outside. As the officer approached, however, the vehicle drove away, so Holliday did a traffic stop. As Mock, the driver, rolled down the window, Holliday could smell marijuana strongly. Mock admitted to drugs in the vehicle.

A K9 officer went over the vehicle and the dog hit on the passenger side, where Splawn was sitting in the front seat. She was found to have a joint in her purse and cocaine was in a bag between the seat and door. She was charged with both and moved for suppression. The Court ruled the traffic stop was valid. Splawn took a conditional guilty plea and appealed.

ISSUE: May a violation of an ordinance support a stop?

HOLDING: Yes

DISCUSSION: Splawn argued that the officer lacked reasonable articulable suspicion to make the initial stop. The court looked to Baker v. Com., and noted that an officer who has probable cause of a violation of a civil traffic offense may make the stop."[65] The position of the vehicle violated local ordinance, and the fact that it subsequently moved did not negate that fact.

The Court upheld her plea.

Brooks v. Com., 488 S.W.3d 18 (Ky. 2016)

FACTS: On January 3, 2014, Deputy Carroll (Montgomery County Sheriff's Office) was flagged down on patrol by a female. She reported that "she had just seen what appeared to be a domestic dispute taking place between the occupants of a black car, which was traveling on Cartwright Road toward Trimble Trailer Park." Though the witness did not identify the car in any manner beyond its color, she described the occupants: an adult female driver, an adult male passenger, and two children in the back seat." She was never identified. Deputy Carroll proceeded to the area and pulled off to wait. He spotted a vehicle, driven by Brooks, that fit the description, coming from the trailer park. He made a traffic stop.

When he approached, he asked if the two had been fighting. Carroll later "testified that he "couldn't get a lot out of the driver," who refused to make eye contact, and spoke in a quiet voice. He further testified that Brooks [the passenger] spoke over the driver and answered Carroll's questions for her." He was concerned about the female driver's behavior and felt he should talk to them separately.

> It was about that point in time that a second officer, Deputy Ashton Thornberry, arrived on the scene. Carroll was on the driver's side of the vehicle and asked her to step out with him while Brooks would step out and speak with Thornberry. Carroll testified that, in that instant, he noticed something in Brooks' right hand. Upon Carroll's verbal warning to Thornberry about the item in Brooks' hand, Brooks attempted to surreptitiously drop the object in the floor of the vehicle as he stepped out. The object in Brooks' hand turned out to be a handful of prescription pills, which landed in plain view in the vehicle's passenger side floorboard. When asked, Brooks denied knowledge of the pills, and was arrested for possession of a controlled substance.

Brooks was indicted on several counts related to the pills, which included methadone and alprazolam. He moved for suppression and was denied. Brooks took a conditional guilty plea and appealed.

ISSUE: Does an unsupported anonymous tip of a problem justify a stop?

[65] 475 S.W.3d 633 (Ky. App. 2015); Wilson v. Com., 37 S.W.3d 745 (Ky. 2001).

HOLDING: No (but see facts)

DISCUSSION: The Court agreed that "[n]o right is held more sacred, or more carefully guarded, by the common law, than the right of every individual to the possession and control over his own person[.]"[66] For this reason, warrantless searches are presumed unreasonable unless they fall within a clearly defined exception to the warrant requirement.[67] The prosecution bears the burden of proving a warrantless search was reasonable.[68]

The Court noted that "an anonymous tip, standing alone, cannot create a reasonable suspicion to justify a Terry stop. In Florida v. J.L., the Supreme Court found that an anonymous tip, which accurately described an individual, his clothing, his location, and correctly claimed the individual possessed a concealed firearm, did not create a reasonable suspicion to permit the individual to be searched, because the tip "lacked sufficient indicia of reliability."[69] In Alabama v. White, the Supreme Court found an anonymous tip was sufficient to justify a Terry stop when the tip accurately predicted the future behavior of the person to be searched. This prediction of future behavior indicated the tipster possessed a level of intimate knowledge of the individual to be searched, which the Court found to be sufficient indicia of reliability.[70]

The Supreme Court of Kentucky cited both J.L. and White in Collins v.Com. The Court concluded that a tip from an unknown 911 caller, which described a dispute between two patrons of a gas station, where they began throwing bottles at each others' vehicles, was unreliable and therefore did not rise to the level of creating a reasonable suspicion. Even though the tip in Collins was corroborated by the officer later, the Court found the tip lacked reliability because "the investigating officer did not independently observe any illegal activity, or any other indication that illegal conduct was afoot." The tip at issue here was even less reliable than in Collins: the tipster did not allege any criminal activity had occurred. The trial court relied entirely on Carroll's testimony that the tipster had informed him of a "verbal or physical domestic," but he later testified on cross-examination that the tipster did not tell him she had seen any physical contact. Further, Carroll did not observe any criminal activity or traffic violations once he had located a black vehicle, which may or may not have been the vehicle the lady claimed to have seen earlier. There was no reasonable suspicion of criminal activity preceding the stop of the Brooks' vehicle. The trial court even noted as much at the hearing, when it found that there was no evidence of any crime at any point in the stop until the pills came into the officers' view.

Further, the Court disagreed that this was the use of the "emergency aid doctrine" and described it as follows:

> The central purpose of the aptly named emergency aid exception is to allow police officers to assist persons who are seriously injured or threatened with such injury. Law enforcement officers frequently perform essential community caretaking functions, such as helping stranded motorists, returning lost children to anxious parents, and assisting and protecting citizens in need, that are wholly divorced from law enforcement's criminal related functions…. Society desires that police officers assist citizens in such life-threatening situations; the emergency aid exception permits them to do so. Consequently, despite the differences between homes and automobiles, we find no reason for making the emergency aid exception unavailable under appropriate circumstances when police officers conduct a warrantless search of a motor vehicle.

"The test for whether this exception applies has two prongs: 1) whether the officer, based on the information available at the time, had an objectively reasonable belief 2) that an occupant of the vehicle was in need of immediate aid." The Court found that the mere possibility of physical violence was insufficient to justify a stop, given that there was no indication anything had occurred.

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[66] Terry v. Ohio, supra (1968).
[67] Katz v. U.S., 389 U.S. 347 (1967); Chandler v. Miller, 520 U.S. 305 (1997).
[68] Com. v. McManus, 107 S.W.3d 175 (Ky. 2003) (citing Vale v. Louisiana, 399 U.S. 30 (1970)).
[69] 529 U.S. 266 (2000).
[70] 496 U.S. 325 (1990).

As such, the Court vacated the plea.

SEARCH & SEIZURE – CONSTRUCTIVE POSSESSION

Lane v. Com., 2016 WL 2893782 (Ky. App. 2016)

FACTS: On March 12, 2014, Officers Perdue, Roberts and Thornberry (Mt. Sterling PD) were approached by an unknown woman at about 10 p.m., concerning two men in a vehicle acting suspiciously in a nearby grocery parking lot. They investigated and found a vehicle that fit the description. The officers approached and when Lane (front passenger) spotted Thornsberry, he "turned back around and reached under his seat." The officer drew his weapon and ordered him to show his hands, but Lane did not comply, continuing to reach under the seat. Officer Roberts pulled Lane out and frisked him. Deputy Thornsberry looked inside and spotted a cellophane wrapper and a white plastic tube [71]. The driver denied any knowledge of the items and gave consent to search. Nothing was found on the driver.

The items found contained 34.5 pills (variations of oxycodone). Lane was arrested and a large amount of cash was found. He denied knowing anything about the pills but stated he would not "tell on" anyone. He stated the money belonged to a family member.

Lane was convicted for Trafficking 1st and appealed.

ISSUE: Do drugs found in close proximity to a subject constitute constructive possession?

HOLDING: Yes

DISCUSSION: Lane argued that there was insufficient evidence that "he had actual or constructive possession of the pills recovered from the car." To prove the latter, the Commonwealth must "present evidence which establishes that the contraband was subject to the defendant's dominion and control."[72] The Court looked to Barnett v. Com., in which drugs were found where Barnett had been sitting.[73] The Court noted that the driver denied knowledge of the items and it was not credible that a third party had placed the items where they were found. Lane's reaching under the seat provided a strong indicator that he was aware of the item found there, and the location of a tube containing some of the pills, in the actual seat, was clear evidence a jury could use to conclude that he possessed them. In addition, his "behavior in reaching beneath his seat towards the cellophane wrapper," even after being ordered to show his hands, suggested he did know that the item was there.

Lane also argued that it couldn't be proven he had more than the statutory number of pills, as the lab only tested a sample. The court, however, that was not an issue. With respect to trafficking, the Court agreed that there were "numerous pieces of evidence" that supported that Lane possessed with intent to sell – including that they were in improper containers and five different logoed types of pills." He had over $700 in small bills, as well.

Lane also argued he was denied his confrontation rights because the initial informant was not available. The Court had agreed that the officers could not mention drug activity, but were limited to using the phrase "suspicious activity" instead. The Court agreed that the testimony they repeated from the informant was not hearsay but was "offered primarily to explain why the police approached the vehicle. Even if error, however, the Court agreed that it would be harmless.

[71] Note, although the decision indicated that the officers were from a city police department, it does reference Thornberry as being a deputy.
142 S.W.3d 113 (Ky. 2004).[72]
[72] Pate v. Com., 134 S.W.3d 593 (Ky. 2004).
[73] 31 S.W.3d 878 (Ky. 2000).

SEARCH & SEIZURE – EXIGENT ENTRY

Lydon v. Com., 490 S.W.3d 699 (Ky. App. 2016)

FACTS: On March 6, 2013, On March 6, 2013, Officer DeArmond (Hopkinsville PD) and a trainee went to Lydon's apartment in search of a juvenile who was wanted for an incident that had occurred that day. They did a knock and talk and Officer DeArmond told him he had "reliable information" that the juvenile was there. Lydon denied anyone else was there. Officer DeArmond noted that he could smell burning marijuana and asked if the marijuana belonged to Lydon. "Before Lydon could answer," the two officers entered. They immediately spotted the juvenile they sought lying on the couch. They handcuffed the juvenile and did a visual sweep of the apartment, during which the officers spotted marijuana and paraphernalia in plain view. Lydon, handcuffed, was asked for consent, and absent that, was told they would get a warrant. He gave a written consent and ultimately was cited for Possession.

Lydon moved for suppression. Officer DeArmond testified that he entered to secure the location and preserve evidence. The District Court denied the suppression motion and Lydon entered into a conditional guilty plea. He then appealed. The Circuit Court agreed that there was exigent circumstances and upheld the entry. Lydon further appealed.

ISSUE: Must there be a clear indication of emergency to justify an exigent entry?

HOLDING: Yes

DISCUSSION: The Court agreed that "under certain exigent circumstances," which includes destruction of evidence, officer can enter without a warrant.[74] In King v. Com., however, the Court noted that "exigent circumstances do not deal with mere possibilities, and the Commonwealth must show something more than a possibility that evidence is being destroyed to defeat the presumption of an unreasonable search and seizure."[75] The court noted that in Quintana v. Com., it had held that a knock and talk is a proper procedure, but is limited to the officer going only where they are allowed to be.[76]

In this case, the Court concluded that the police had even less indicia of criminal activity and exigent circumstances prior to entering Lydon's apartment, than the officers had in King. Although the smell of marijuana was probable cause, it was not by itself sufficient "to create exigent circumstances justifying a warrantless entry." By the time they spotted the juvenile, they were already inside, exceeding the boundary of a knock and talk.

The Court reversed the trial court and remanded the case.

Pope v. Com., 2016 WL 1392281 (Ky. App. 2016)

FACTS: Pope contended that officers 'made a warrantless search of his home after they were dispatched in response to a neighbor's 911 call reporting a possible burglary at Pope's residence" in Fayette County. An officer arrived and learned that a subject (identified by license plate) had entered the house next door and taken a television. He confirmed that the back door was open, but not apparently forced. With backup, they entered and cleared the home, and spotted illegal items in plain view. As a result of the entry, Pope was charged with cultivating marijuana. He was denied suppression and took a conditional guilty plea, and then appealed.

ISSUE; Does a report of a burglary in progress justify an entry?

HOLDING: Yes

[74] Com. v. McManus, 107 S.W.3d 175 (Ky.2003); Segura v. U.S., 468 U.S. 796 (1984).
[75] 386 S.W.3d 119 (Ky. 2012).
[76] 276 S.W.3d 753 (Ky. 2008).

DISCUSSION: The Court agreed that the exigent circumstances justified the warrantless entry, finding it well settled that a possible report of a burglary permitted the entry under the circumstances, even without evidence of forced entry. Further, the entry into the basement was also justified. Even though the evidence suggested the burglar had left and the sole occupant was not home (as he car was not there) the "officers could not have known if anyone were hiding, injured, or restrained inside." It was appropriate to enter to ensure that "no one was injured or that no other suspects were in the home."

The Court affirmed the denial, and the plea.

SEARCH & SEIZURE – ABANDONED PROPERTY

Marino v. Com., 488 S.W.3d 621 (Ky. App. 2016)

FACTS: In 2000, an unknown subject sexually assaulted Murphy, a bedridden nursing home resident in Bardstown. A rape kit was taken, but there was no suspect identified. Murphy died a year later. Eight years later, Marino was arrested by Captain Strunk, who realized that he matched the description. He informed Det. Roby (who had taken the original call as an officer) about his suspicions. She interviewed Marino at the jail, taking with her a Styrofoam cup. She offered him water in the cup she provided and he drank it, she then secured the cup. He refused to talk to her about the allegations. Ultimately, the DNA on the cup matched that recovered from the rape kit. (She obtained a blood sample by warrant, to confirm, as well.)

Marino was indicted for Rape and Burglary. He moved to suppress the DNA evidence, but that was denied. He took a conditional guilty plea and appealed.

ISSUE: Is collecting DNA from an abandoned cup permitted?

HOLDING: Yes

DISCUSSION: The Court looked at the admissibility of the DNA collected from the cup and agreed that the abandoned property exception applied to the situation. The Court noted that:

> Individuals cannot have a reasonable expectation of privacy in property they abandon; thus, a search of abandoned property is not, without more, unreasonable. What constitutes abandoned property has to be determined on a case-by-case basis. [T]rial courts must weigh the evidence and consider the circumstances in reaching a conclusion as to whether the property has, in fact, been abandoned.[77]]
>
> In this case, the saliva/DNA was acquired through no intrusion at all, and as such, did not automatically become a search. He left it behind when he returned to his cell, and he "clearly knew that the cup would not remain indefinitely on the table and someone would need to pick it up and dispose of it."[78]

As such, it was admissible. The Court also agreed that the search warrant, obtained as a result of the DNA, was also proper.

The Court upheld Marino's plea.

[77] King v. Com., 374 S.W.3d 281 (Ky. 2012).
[78] California v. Greenwood, 486 U.S. 35 (1988); see also Com. v. Ousley, 393 S.W.3d 15 (Ky. 2013).

SEARCH & SEIZURE – PROTECTIVE SWEEP

VanVorst v. Com., 2016 WL 1627532 (Ky. App. 2016)

FACTS: In June, 2012, two Hardin County deputy sheriffs went to VanVorst's home to serve a bench warrant for failure to appear. They knocked on both the front and back door, but no one answered. At that point, "one of the deputies heard male voices in the kitchen, and made contact with VanVorst at the kitchen window." VanVorst came to the door and was placed in custody. "The deputies entered the home, and conducted a sweep of the house, during which two additional male subjects were found in the home, later identified as David Young, for whom deputies also had an arrest warrant, and Chester Coogle." They also noted a "strong chemical odor" and saw items suggesting methamphetamine manufacturing. VanVorst denied their request to do a more detailed search. They obtained a search warrant and found a number of items. All three men were arrested.

VanVorst requested suppression of the search and the statements he made at the scene. However, before a hearing, VanVorst took an unconditional guilty plea. However, he then later moved to have his guilty plea set aside for ineffective assistance of counsel.

ISSUE: Can an arrest outside a home still justify a protective sweep?

HOLDING Yes

DISCUSSION: Although not required to do so, the Court looked at the protective sweep, noting that it is "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding."[79] This warrant exception "permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." VanVorst argues that since he was arrested on the doorstep of his home, his arrest was not "in-home" within the meaning of Buie. However, Buie has been extended to include an arrest taking place outside of a residence when the totality of the circumstances would cause a reasonable police officer to have "articulable suspicion that a protective sweep [was] necessary by reason of a safety threat."[80]

In the instant case, the facts support a protective sweep of the VanVorst residence: there were multiple cars in the driveway when the deputies arrived; the deputies heard more than one male voice through the kitchen window; VanVorst delayed between making contact with the deputies and answering the door. Furthermore, the deputies only searched in areas where an individual may be hiding, such as under beds, where one of the defendants actually was hiding. The deputies clearly had a reasonable basis for the belief that additional individuals might have been hiding in the home, and might have posed a threat to their safety. The trial court was correct in finding that the initial entry into the VanVorst residence was a proper protective sweep.

Additionally, once the protective sweep resulted in plain view observations consistent with methamphetamine manufacturing, the deputies asked VanVorst to consent to a further search of the residence. When he refused, the deputies properly halted the search and obtained a search warrant based on an affidavit of the events, which was granted, and found all the hallmarks of methamphetamine production. VanVorst's argument that the discrepancies in the record about the time the deputies arrived or executed the search warrant is indicative that the search was improper is irrelevant. He fails to explain how this affects the validity of the search. The underlying facts of the warrant are not in dispute, nor is the underlying arrest warrant that permitted the initial encounter. The trial court was correct in finding that the admission of the evidence from the house was inevitable and would have sustained the charges against VanVorst.

[79] Maryland v. Buie, 494 U.S. 325 (1990).
[80] Brown v. Com., 423 S.W.3d 765 (Ky. App. 2014).

Because the Miranda issue was not raised until the post-plea appeal, the court declined to evaluate it.

The Court upheld VanVorst's plea.

SEARCH & SEIZURE – VEHICLE

Prather v. Com., 2016 WL 3574605 (Ky. App. 2016)

FACTS: In 2005, Prather was arrested on drug charges, as a result of a search of his vehicle. He took a conditional plea and appealed. And in 2007, the Court of Appeals upheld the search and his plea. Nothing more occurred until 2014, when he took a collateral appeal, arguing that the arresting officer had pled guilty to theft in federal court and acknowledged taking seized drug money. He also argued that the search was constitutionally improper pursuant to Arizona v. Gant, which was decided following the end of Prather's direct appeal.[81] The Court denied his motion and Prather appealed.

ISSUE: Is Gant retroactive?

HOLDING: No (not on collateral review)

DISCUSSION: The Court noted that the motion in question, a CR 60.02, is "a means to correct errors in the trial process that could not be corrected by any other means." It is not to be granted unless "the new evidence if presented originally, would have, with reasonable certainty, changed the result. In this case, the Court noted that the other instances of wrongdoing by the officer did not involve Prather's case in any way. The search of the car took place four years prior to Gant, and all direct appeals ended more than two years before Gant was decided. There was no legal authority to retroactively apply Gant.

The Court upheld Prather's case.

Taylor v. Com., 2016 WL 2605296 (Ky. App. 2016)

FACTS: Officer Farley, Lexington PD, was patrolling about 3:37 a.m. He spotted and recognized Taylor's vehicle as one he'd seen earlier driving in the area, and pulling into a sports pub. Taylor's vehicle was in a turn lane, stopped, but when the light changed, he did not move, and two vehicles had to drive around him. It sat through another cycle as Officer Farley say behind him. He approached the vehicle on foot, finding Taylor, "unconscious, with his foot on the brake." The vehicle was running and the doors were locked. Officer Bereznak arrived as backup. They pounded on the car but could not arouse Taylor. One officer was able to get in with a slim jim and another got the vehicle into park and unlocked the doors. EMS arrived and tried to wake him up using sternum rubs and shouting. "He did eventually come to and was pulled out of the vehicle," and "was unsteady on his feet, incoherent, and unresponsive to verbal commands." One of the officers recognized Taylor as someone known to carry a gun.

When Taylor made a move to get back into the car, he was kept away and taken to the front of the vehicle. Officer Brislin searched the front seat area, finding an open alcohol container, along with a large quantity of oxycodone and cocaine. He was arrested and given FSTs. He was given Miranda. A further search of the trunk disclosed marijuana, scales and Suboxone. A large amount of cash was found on Taylor's person.

Taylor was charged with DUI and trafficking, along with related crimes. He moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a search inside a vehicle justified when the subject is still within reaching distance?

HOLDING: Yes

[81] 556 U.S. 332 (2009).

DISCUSSION: Taylor argued that the warrantless search of his vehicle, initially, was "unconstitutional because he was restrained and not within reaching distance of his vehicle at the time."[82] The trial court had found that Taylor being seized and removed from the immediate area occurred contemporaneously with the search, and that he'd already been identified as likely having a firearm, when he attempted to get back into the car.

The Court agreed that the search was justified under Michigan v. Long.[83]

However, the Court also noted that it could be justified under Gant's second provision, when evidence of the crime of arrest might be found in the vehicle.[84] Officers certainly had reason to believe he was under the influence of drugs and/or alcohol., and that the vehicle "harbored evidence of the crime of arrest." Once the evidence was found in the car, there was probable cause to believe there was more, justifying the trunk search.[85]

The court affirmed the denial of the motion.

Kennedy v. Com., 488 S.W.3d 41 (Ky. App. 2016)

FACTS: Officer Ray (Lexington PD) was on patrol about 10:30 p.m. when he prepared to make a traffic stop. His "reasons for stopping the car were twofold: First, he was unable to read the temporary tag affixed to the inside upper left corner of the vehicle's tinted rear window. Second, the car matched the description of a vehicle that had fled from Officer Derrick Wallace on two separate occasions a month before." He requested backup and Officers Newman and Terry responded. Ray made the stop and as he approached, he could see that the temporary tag had expired. Four people were in the car, including Kennedy, with Green being the driver. Green provided information on the vehicle. Officer Terry told Officer Ray that he was familiar with Green, "an active gang member known to carry weapons and narcotics. Officer Ray directed Terry to call a K-9 unit to the scene and ordered Green and his passengers to exit the car one by one. He frisked them and made them sit on the curb."

Within a few minutes, a K-9 had arrived and alerted. Cocaine, marijuana and cash was found in a purse in the car, and Kennedy was discovered to have a warrant. Cocaine and cash were found during the subsequent search.

Kennedy was charged with Trafficking and related offenses. He moved for suppression, which was denied. He took a conditional plea and appealed.

ISSUE: Does improper display of temporary tags justify a stop?

HOLDING: Yes

DISCUSSION: The Court agreed that ""'[s]topping an automobile and detaining its occupants constitute a "seizure"' under the Fourth Amendment."[86] "Traffic stops are similar to Terry stops and must be supported by articulable reasonable suspicion of criminal activity." The Court looked to the requirements for the display of a temporary tag. Kentucky Revised Statutes (KRS) 186.170(1) sets forth the requirements for the display of motor vehicle registration plates and provides that plates shall be kept legible at all times, and that the rear plate shall be illuminated during nighttime hours. The statute does not, however, make any reference to specific display requirements for 'temporary tags.' Temporary motor vehicle registration is governed by KRS 186A.100 and 186A.105, but these statutes do not set forth specific display requirements for temporary tags."

In denying Kennedy's suppression motion, the trial court held that the display requirements of KRS

[82] Arizona v. Gant, 556 U.S. 332 (2009).
[83] 463 U.S. 1032 (1983); Docksteader v. Com.., 802 S.W.2d 149 (Ky. App. 1991).
[84] Rose v. Com., 322 S.W.3d 76 (Ky. 2010).
[85] Estep v. Com., 663 S.W.2d 213 (Ky. 1983); Chavies v. Com., 354 S.W.3d 103 (Ky. 2011).
[86] Chavies v. Com., 354 S.W.3d 103 (Ky. 2011) (citing Delaware v. Prouse, 440 U.S. 648 (1979).

186.170(1) do apply to temporary tags, and that the traffic stop was proper because Green's tag was not legible.

The Court continued:

> Whether the legibility requirement of KRS 186.170(1) applies to temporary tags is a question that has never been addressed by a Kentucky state court, although it was recently addressed in an unpublished opinion of the United States District Court for the Eastern District of Kentucky, in reliance on an opinion-5-of the Sixth Circuit Court of Appeals.[87] The reasoning of the District Court, although not binding on this Court, is highly persuasive and comports with the foregoing rules of statutory interpretation. The federal court noted that while no Kentucky statute specifically addresses the display of temporary license plates, no statute exempts temporary license plates from the requirements of KRS 186.170(1), "nor are Courts free to create exceptions to general statutory requirements." The opinion concludes that the legislature intended KRS 186.170(1) "to apply to both temporary and permanent license plates. After all, both temporary and permanent license plates share the same function of demonstrating that a vehicle is properly registered, and that function can only be served if both types of plates are legible."
>
> Our conclusion that this is the correct interpretation is reinforced by the language of 601 Kentucky Administrative Regulations (KAR) 9:140. The regulation, which governs the issuance and physical appearance of temporary tags, uses the term "temporary registration plates," which strongly suggests that the requirements of KRS 186.170(1) are applicable to temporary tags. "Administrative regulations of any kind which have been duly adopted and properly filed have the full effect of law."[88]
>
> Because the manner in which the temporary tag was displayed in Green's car violated the legibility requirement of KRS 186.70(1), Officer Ray's traffic stop was justified. "[A]n officer who has probable cause to believe a civil traffic violation has occurred may stop a vehicle regardless of his or her subjective motive in doing so."[89]

The court upheld the denial of the motion to suppress and upheld the plea.

Blake v. Com., 2016 WL 3226309 (Ky. App. 2016)

FACTS: Det. Shoemaker (KSP) was on a drug task force "when he conducted a drug investigation in Muhlenberg County of a suspected dealer selling drugs out of his home." He became suspicious of a vehicle that was parked there, as being the "source of narcotics a confidential informant purchased from the suspected dealer inside the home." He learned that it belonged to Blake, who was rumored to be involved in drug trafficking and suspected her to be the supplier. Two controlled buys were made that connected to vehicle with the trafficking. After the second one, Det. Shoemaker asked Sgt. Jenkins (Central City PD) to make a traffic stop.

> Det. Shoemaker testified he wanted Sgt. Jenkins to develop his own probable cause for stopping the vehicle because he did not want to expose his confidential informant and was not sure if the driver was the supplier. At the time he requested that Sgt. Jenkins stop the vehicle, Det. Shoemaker did not know whether his confidential informant had purchased narcotics on that occasion.
>
> Sgt. Jenkins testified he was familiar with Blake as being rumored to be involved in trafficking narcotics and, in response to the call, he began following a red Hyundai which matched the

[87] U.S. v. Locklear, No. CRIM.A. 13-12-DLB, 2013 WL 4679727, at *3 (E.D. Ky. Aug. 30, 2013) (citing U.S.v. Foster, 65 F. App'x 41 (6th Cir. 2003)).
[88] Flying J Travel Plaza v. Com., Transp. Cabinet, Dep't of Highways, 928 S.W.2d 344 (Ky. 1996).
[89] Wilson v. Com., 37 S.W.3d 745 (Ky. 2001)/

> description and license plate Det. Shoemaker supplied. At 5:15 p.m., he noticed the vehicle's rear license plate was not illuminated and at 5:16 p.m., he stopped the vehicle for this violation.

Blake immediately gave consent to a search of the vehicle – and methamphetamine was found. Over $10,000 in cash was found in her purse and it was later discovered that some of the money had been obtained from the CI. The trial court found there was no probable cause for the stop, under Kentucky Revised Statutes (KRS) 186.170(1) and KRS 189.030(1). Blake was not required to illuminate her license plate until thirty minutes after sunset, Blake was stopped at 5:16 p.m. and sunset occurred at 5:08 p.m."

> However, the trial court found the stop was still lawful based on the transfer of reasonable suspicion between officers, explaining Det. Shoemaker's reasonable suspicion that Blake was involved in criminal activity was sufficient for Sgt. Jenkins to stop Blake's vehicle. The trial court stated a warrantless investigatory traffic stop was justified because the facts and totality of circumstances surrounding it indicated the existence of a reasonable and articulable suspicion that Blake was engaged in an unlawful activity.

Blake took a conditional guilty plea and appealed.

ISSUE: Is it proper to act on observed violations when the officer already has information enough to support a stop from another officer?

HOLDING: Yes

DISCUSSION: Blake argued Sgt. Jenkins had no probable cause or reasonable suspicion to stop her because he testified the only reason he stopped her was for a suspected traffic violation. Therefore, he did not rely on the statements and information supplied by Det. Shoemaker in making the stop, but instead acted based on his independent but incorrect belief that a traffic violation had occurred. Alternatively, Blake argues that if reasonable suspicion could transfer from one officer to another, it could not transfer here because Det. Shoemaker did not have reasonable suspicion Blake was involved in criminal activity."

The Court noted that:

> In order to uphold the protections of the Fourth Amendment, an officer conducting an investigatory stop must have a reasonable suspicion, based on objective and articulable facts, that criminal activity has occurred, is occurring, or is about to occur. To determine whether an officer had reasonable suspicion, a court must look at the totality of the circumstances surrounding the officer's decision to conduct an investigatory stop.[90] If an illegal stop or detention takes place, it "taints" any subsequent consent, thus making the evidence seized pursuant to such consent inadmissible.[91]

The court agreed that "based upon when Blake was stopped, she had not violated the license plate illumination statute and thus, there was no basis for a traffic stop. In Baker v. Com., we stated the officer must highlight his reasonable suspicion of the violation of the law required to initiate the stop. Because this stop for failure to illuminate license plate was not authorized by law, we must reverse."[92]

The Court agreed that although it was possible to transfer reasonable suspicion between officers, in this case, the sergeant testified the stop was based on the traffic offense, not what he learned from Det. Shoemaker. Blake's plea was reversed and the case remanded, and her motion to suppress should have been granted.

[90] Com. v. Morgan, 248 S.W.3d 538 (Ky. 2008).
[91] Henson v. Com., 245 S.W.3d 745 (Ky. 2008).
[92] 475 S.W.3d 633 (Ky.App. 2015).

Hensley v. Com. 2016 WL 3226311 (Ky App. 2016)

FACTS: On January 23, 2014, Hensley, Ruwan and another individual went together to purchase a video camera, intended as a gift from Hensley to Ruwan. The seller, a friend, **"**took the video camera into a back room of her home, out of sight of Hensley, then returned and handed Hensley the case with the camera purported to be inside." However, a few minutes from home, Hensley was pulled over by Officer Gayer (Erlanger PD) for speeding. When asked about any possible drugs or weapons, "Hensley became visibly nervous, and attempted to confer with the other passengers." Gayer had him step out. Det. Rolfson arrived as backup.

Hensley, now out of the vehicle, became more nervous although he answered in the negative. He emptied his pockets on request and gave consent to the camera case being opened. Heroin and other related items were found, along with film and film canisters. He stated that the camera case was Ruwan's.

At trial, he argued he did not consent to the search but that he recognized the material found as heroin. He testified that the camera was in the case at the time, but no camera was actually found. Hensley was convicted of Possession and appealed.

ISSUE: May an officer make a pretext stop using the violation of an ordinance?

HOLDING: Yes

DISCUSSION: Hensley first argued that the traffic stop was not supported by probable cause. Since there were no uninvolved witnesses, and Gayer did not have a camera, it came down to witness credibility. The "trial court specifically found Hensley's claims of coercion unbelievable and that his consent to the search was voluntary, and stated explicitly the facts on which it relied." The Court noted that the trial court's finding were "explicitly founded on Officer Gayer's testimony at the suppression hearing, which the court deemed trustworthy." The Court agreed that a traffic stop was a seizure, but that ""an officer who has probable cause to believe a civil traffic violation has occurred may stop a vehicle regardless of his or her subjective motivation[.] Recent Kentucky cases have addressed situations in which seemingly minor violations justified a traffic stop."[93]

Further**, "**subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[94] Although the entire encounter took two hours, "almost immediately following the initial exchange between Officer Gayer and Hensley, the heroin was discovered, at which point, the traffic stop became an arrest for the possession of heroin and not merely a stop for a traffic violation. The trial court did not err in holding that this stop and the duration of the stop did not violate the Fourth Amendment."

With respect to the consent, the Court agreed that **"**"even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage, as long as the police do not convey a message that compliance with their requests is required."[95] "The Fourth Amendment does not require that a lawfully seized defendant be advised that he is "free to go" before his consent to search will be recognized as voluntary. The Amendment's touchstone is reasonableness, which is measured in objective terms by examining the totality of the circumstances."[96] " The Fourth Amendment test for a valid consent to search is that the consent be voluntary, and voluntariness is a question of fact to be

[93] Wilson v. Com., 37 S.W.3d 745 (Ky. 2001). See, e.g., Wilson, 37 S.W.3d 745 (traffic stop made during a drug investigation when a detective observed one suspect take a wrong turn down a one-way alley with one headlight out); Baker, 475 S.W.3d 633 (traffic stop made for swaying in the lane periodically and "hugging" the outer fog line of the right-hand lane for about two miles"); Dudley v. Com., 2014-CA- 001284-MR, 2016 WL 194785 (Ky. App., Jan. 15, 2016) (traffic stop made for failure to make a turn without signaling); Perrin v. Com., 2013-CA-000562-MR, 2014 WL 2643320 (Ky. App., Jun. 13, 2014) (traffic stop made for failure to dim headlights to oncoming traffic).

[94] Ohio v. Robinette, 519 U.S. 33 (1996)

[95] Florida v. Bostick, 501 U.S. 429 (1991).

[96] Robinette, supra.

determined from all the circumstances." "When considering the totality of the circumstances, a reviewing court should take care not to view the factors upon which police officers rely to create reasonable suspicion in isolation. Courts must consider all of the officers' observations, and give due weight to the inferences and deductions drawn by trained law enforcement officers."[97]" Upon looking at the facts, the trial court ruled the request and subsequent search were proper, and upheld the search.

Finally, Hensley argued it was improper to introduce his prior use and possession of heroin, as a violation of KRE 404(b). The Commonwealth countered that it was using the evidence to "show knowledge and absence of accident or mistake."

The Court noted:

> The Supreme Court of Kentucky has set out a three-part inquiry in Bell v. Com. for the review of the admissibility of evidence of other crimes, wrongs, or acts: Is the prior bad acts evidence relevant for a purpose other than to prove habitual criminal disposition? Is the prior bad acts evidence sufficiently probative of the actual commission of the current crime? Does the potential for prejudice from the use of this prior bad acts evidence substantially outweigh its probative value?[98]

The Court noted that since he acknowledged he recognized what was in the baggie, that it was proper to allow the Commonwealth to question him concerning "the basis of his recognition." The testimony was properly restricted to limit it to "only Hensley's knowledge of the contents of the baggie," since knowingly was the state of mind in this situation.

The Court upheld his conviction.

SUSPECT IDENTIFICATION

Dahms v. Com., 2016 WL 3453407 (Ky. App. 2016)

FACTS: On April 6, 2014, Officer Toms (Lexington PD) responded to a burglary in progress call, arriving within a minute as he was nearby. The caller gave specific descriptions of three males, and the officer spotted men matching the descriptions emerging from the location with TV sets. He confronted the men and two of the men looked at him with a "deer in the headlights look" – dropped the TVs and fled. The third man did not run and was arrested. He identified the other two men, one was quickly apprehended leaving the third, Dahms, still at large. Officer Toms looked up previous booking photos and confirmed the missing man was Dahms. Dahmns was arrested later that night.

At a suppression hearing over eyewitness testimony, Officer Toms testified as to the circumstances of the identification, that he had a clear view of Dahms from 20-25 feet away. The Court denied the motion. Dahms took a conditional plea to Burglary and related offenses and appealed.

ISSUE: Is an officer's ID tainted by looking up booking photos to confirm an ID?

HOLDING: No

DISCUSSION: Dahms argued that the identification as tainted by the officer looking up the booking photo as part of his process. The Court, however, noted that this was not the usual situation, an officer was the eyewitness who already had a name from another suspect. "The follow-up identification by Officer Toms using the Fayette County Detention Center mugshot was simply good police work, in that the officer used the photograph to clear or confirm the identity of the named suspect." Further, although

[97] Greene v. Com., 244 S.W.3d 128 (Ky. App. 2008).
[98] 875 S.W.2d 882 (Ky. 1994); KRE 403.

unnecessary, the trial court had even gone through a full Biggers' analysis, and found it to be a reliable identification.[99]

The Court upheld the denial of the motion.

Taylor v. Com., 2016 WL 3035648 (Ky. App. 2016)

FACTS: On September 9, 2014, Jones's Casey County home was burglarized. He encountered a man and woman in his bedroom, challenged them and was knocked backwards. The couple fled on a motorcycle. Deputy Weddle responded to the call and Jones gave a detailed description of the man, and a lesser description of the woman. Deputy Weddle drove around the area and spotted a motorcycle that resembled the description provided and found Cornett at the house. Cornet matched the description of the male subject. However, when the deputy showed Cornett's photo to Jones, he denied that it was the man who had burglarized.

> Deputy Weddle repeated the same procedure over the next several weeks, showing Jones three or four individual pictures. When Jones did not identify any of those pictures as the male burglar, Deputy Weddle reached out to Pulaski County Detective John Hutchinson. Detective Hutchinson sent Deputy Weddle a photograph of Travis Taylor. Deputy Weddle saved the photo of Taylor on his cell phone and showed it to Jones, who identified Taylor as the man who burglarized his home.

Taylor was indicted on Burglary1st and related charged. Taylor moved for suppression, arguing that the "deputy sheriff's actions in taking photos of suspects one-by-one to Jones, rather than providing a multiple-photo lineup, was unduly suggestive and thus created an unreliable identification when Jones identified Taylor as the man who had burglarized his home." Although agreeing that a better lineup could have been used, the Court held that the identification was sufficiently reliable. The motion was denied. He was ultimately convicted and appealed.

ISSUE: Is the showing of a single photo unduly suggestive?

HOLDING: Yes

DESCRIPTION: The Court looked to Dillingham v. Com.,

> A conviction based on identification testimony following pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is so 'impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The determination of whether the in-trial use of identification testimony violates due process involves a two-step process. First, the court examines the pre-identification encounters to determine whether they were unduly suggestive. If so, "the identification may still be admissible if 'under the totality of the circumstances the identification was reliable even though the [identification] procedure was suggestive."[100]

The Court agreed that a two-tiered approach was needed. "First, this court must determine whether the identification procedures were unduly suggestive; if the procedure was unduly suggestive, we must then decide if, under the totality of the circumstances, the identification was reliable."

The trial court did agree that "Deputy Weddle's procedure of bringing one photo at a time to Jones to ask if the man in the photograph was the man who burglarized his home was unduly suggestive. An out-of-court, pretrial identification may be excluded if "unnecessarily suggestive and conducive to irreparable

[99] Neil v. Biggers, 409 U.S. 188 (1972)
[100] 995 S.W.2d 377 (Ky. 1999).

mistaken identification."[101] Our analysis, therefore, turns on whether the procedure employed by the police created a substantial likelihood of misidentification. Weddle did not combine photos into a photopack or photo array, and showing a witness a single photograph has been held to be an unduly suggestive identification procedure.[102] We agree with the trial court that Deputy Weddle's procedure created a substantial likelihood of misidentification and, accordingly, was unduly suggestive."

However, the Court noted that the identification could still be reliable.

> The totality of the circumstances is examined in light of five factors affecting the reliability of a witness's identification: 1) witness' opportunity to view the criminal at the time of the crime; 2) witness' degree of attention; 3) accuracy of the witness' prior description; 4) witness' level of certainty at the confrontation; and 5) the length of time between the crime and the confrontation.[103] The trial court mentioned each of these factors in its decision at the suppression hearing before concluding that Jones' identification of Taylor was still reliable.

The Court agreed that even though the process was flawed, the identification was still reliable.

The burglary occurred during broad daylight, and Jones was only a foot away from the perpetrator. Jones testified that he was focused on the day of the burglary and no evidence was presented to suggest otherwise. Furthermore, very little time passed between the burglary and Jones' identification of Taylor. While small discrepancies between Taylor's appearance and Jones' description of the male burglar may exist, his description was overall very accurate and changes in appearance were explained at the suppression hearing. Finally, Jones seemed very certain and confident in his identification of Taylor as the burglar.

The court upheld the denial of the motion to suppress.

INTERROGATION

Gonterman v. Com., 2016 WL 2638217 (Ky. 2016)

FACTS: On May 2, 2012, Meade County law enforcement officers searched Gonterman's home without a warrant but based on a written consent. Evidence was found that supported an indictment for Trafficking 1st, firearms offenses and related issues. Gonterman filed a suppression motion, arguing he did not validly consent. At the hearing, Det. Terry (Meade County SO) testified that he'd received tips about Gonterman, including information from a CI and that they went to investigate. They identified themselves to Terry, who was inside, and both deputies were in plainclothes. Det. Terry observed an items who believed to be a HCL generator in plain view.

Det. Terry told Gonterman they had information he was growing marijuana, which he denied. They told him he would not be charged if they found plants. He agreed to a search and signed the form, after confirming he could read and write. Det. Terry had gone over the form with him and told him he didn't have to consent and could refuse. Det. Terry and his partner followed Gonterman inside and observed methamphetamine in various locations. Gonterman sat on the couch, unrestrained, during the search and soon began to cry. Det. Terry told him they would see if they could help him with his drug addiction.

Gonterman, however, testified they did not ask for consent and that when he went inside, they followed him, and he didn't know he could, or had to, tell them not to do so. He knew there were drugs inside He stated he was handcuffed during the search. He was given papers to sign afterward and did so, but did not know what they were. (He did admit he'd likely smoked methamphetamine that day, but insisted he had good recall of what happened.) He testified that he was of diminished capacity due to a brain injury

[101] Stovall v. Denno, 388 U.S. 293 (1967); *see also* Neil v. Biggers, supra. (Identifications admissible only when "no substantial likelihood of misidentification" exists).
[102] *See* Fields v. Com., Nos. 2009–SC–000435–MR, 2009–SC–000457–MR, 2009–SC–00732–TG, 2011 WL 3793149 (Ky., Aug. 25, 2011) (holding that showing a witness a single photograph of the accused and no others was unduly suggestive).
[103] Rodriguez v. Com., 107 S.W.3d 215 (Ky. 2003), citing Biggers, supra.

and that he could not read or write very well. He had been on disability, but had gotten off of it and had a job in manual labor, tree cutting, in which he used heavy equipment. Other evidence corroborated much of what he said and he was assessed as borderline with respect to intellectual functioning, but he was considered competent. The trial court found that he functioned in a manner sufficient to give a valid consent.

Gonterman took a conditional guilty plea and appealed.

ISSUE: Is voluntariness judged by the totality of the circumstances?

HOLDING: Yes

DISCUSSION: The Court noted that the question of voluntariness is a matter to be judged by the totality of the circumstances and the objective perspective of the reasonable officer at the scene.[104] The Court agreed that substantial evidence supported that Gonterman could read and write sufficiently well and that no threat or promise was made to induce consent.

SIXTH AMENDMENT

Keysor v. Com., 486 S.W.3d 273 (2016)

FACTS: Keysor was arrested in Graves County on two counts of Sexual Abuse. He received appointed counsel at his request. While awaiting trial, Graves County officers learned his putative victim had reported to Marshall County authorities she had also been sexually abused by him in Marshall County. Marshall County officers, along with a social worker, went to Graves County to question him about the crime. His counsel was not notified of this.

> At the outset of their interrogation, the officers advised Appellant of his Miranda rights and informed him that they were there only to discuss the Marshall County allegations. With that understanding and without contacting or consulting his attorney, [Keysor] signed a waiver of his right to remain silent and voluntarily agreed to talk to Marshall County authorities. Despite their stated purpose to collect information only about the Marshall County allegations, the interrogation expanded to include questions pertinent to the pending Graves County charges. [Keysor] denied the allegations. When he said that a polygraph would confirm his innocence, the interrogating officers asked him to submit to a polygraph examination, and he did so. Eight days later, a polygraph examination was arranged by Marshall County police authorities. [Keysor] again waived his right to remain silent and submitted to the examination. Again, his appointed counsel was not informed of this procedure. During the interview with police that immediately followed the polygraph examination, [Keysor] made incriminating statements which the Commonwealth then decided to use in the pending Graves County prosecution.'

When his counsel learned of this, a suppression motion was made, addressing only the admissibility of the statements in the Graves County trial. He argued that "the use of the statements in the upcoming Graves County trial would violate his right to counsel as explained in Michigan v. Jackson[105] and as thereafter adopted by this Court in Linehan v. Com.[106]."

The Graves Circuit Court granted the motion, and "Immediately thereafter, the Commonwealth requested a reconsideration of the issue because just days before the trial court's ruling, the United States Supreme Court decided Montejo v. Louisiana[107] which expressly overruled Jackson." The U.S. Supreme Court had "decided in Montejo that a defendant, charged with murder and represented by counsel, may nevertheless be approached by police for interrogation without the knowledge or presence of counsel,

[104] Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Hampton v. Com., 231 S.W.3d 740 (Ky. 2007).
[105] 475 U.S. 625 (1986).
[106] 878 S.W.2d 8 (Ky. 1994).
[107] 556 U.S. 778 (2009).

and with the defendant's knowing, voluntary, and informed consent, any resulting statements may be admitted against him at trial despite counsel's exclusion from the interrogation." The Graves Circuit Court agreed and changed its latest ruling, thus again denying Keysor's suppression motion, reasoning the Kentucky Supreme Court had previously expressed "that the constitutional right to counsel under Section 11 provided no greater protections than the Sixth Amendment of the United States Constitution."[108] As such, the trial court agreed it was bound to follow the new precedent set by Montejo and allow the admission of Keysor's confessions made in the absence of counsel.

Keysor took a conditional guilty plea and appealed. The Kentucky Court of Appeals echoed the "the trial court's prediction that in light of Montejo [the Kentucky Supreme Court] would overrule Linehan" and upheld the denial of Keysor's motion. Keysor further appealed to the Kentucky Supreme Court.

ISSUE: May a confession taken by law enforcement from an individual about a crime be admitted against the individual , when the confession is taken when the individual is already in custody, has invoked their right to counsel at arraignment and is represented by counsel in another, related case, but that counsel is not notified nor is present?

HOLDING: No

DISCUSSION: The Kentucky Supreme Court noted that Keysor's situation "straddle[d] a dramatic shift in the United States Supreme Court's perception of the Sixth Amendment right to counsel." The Kentucky Supreme Court agreed that the most critical period for a criminal defendant was from arraignment through trial."[109]

The Court continued:

> In Jackson, the Supreme Court merged the Fifth Amendment's right-to-counsel perspective as expressed in Edwards v. Arizona, with Sixth Amendment right-to-counsel principles.[110] Edwards held that an accused person who had invoked his right to counsel could not be subjected to further interrogation by police "until counsel has been made available to him" or "unless the accused himself initiates further communication, exchanges, or conversations with the police." Thus, per Edwards, under the Fifth Amendment, police could not initiate a post-indictment interrogation of a defendant who had requested counsel or was represented by counsel. Statements obtained under those circumstances would be suppressed.

In Jackson, the Court ruled that once a "formal accusation" has been made, the suspect then become the accused, and "the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation."

In 1991, in McNeil v. Wisconsin, the rule articulated in Jackson, which was itself "built upon established right to counsel principles," was reiterated, with the Court noting that "after the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible."[111] From this legal backdrop, Linehan was decided for Kentucky.

Linehan, in fact, was "similar in any relevant aspect" to Keysor's case. In Linehan, the charges were consolidated and the question was "whether the incriminating statements obtained during the investigation of the second crime (but after he had been indicted and appointed counsel on the initial

[108] "[T]he right of counsel guaranteed by Section 11 of the Kentucky Constitution is no greater than the right of counsel guaranteed by the Sixth Amendment of the United States Constitution . . ." Cain v. Abramson, 220 S.W.3d 276 (Ky. 2007) (quoting Cane v. Com., 556 S.W.2d 902 (Ky. App. 1977).
[109] Powell v. Alabama, 287 U.S. 45 (1932).
[110] 451 U.S. 477 (1981).
[111] 501 U.S. 171 (1991).

charges) could be used to convict him of the initial charges." It was decided that his waiver was not valid so as to allow the statements in a trial involving the first offenses, since he had been formally charged and was represented by counsel, in that case at the time he was questioned in the second case.

The Kentucky Supreme Court noted that Montejo was argued and decided on "social utility" reasoning, with one justice noting the constitutional protection afforded, with the cost-benefit of the rule not paying its way when balanced against the ability to find the truth. It noted "every constitutional protection provided to those the government would imprison imposes "substantial costs" upon the criminal justice system; that is so by design. Constitutional protections were put in place by the framers of the state and federal constitutions to hinder oppressive impulses by retarding the government's ability to incarcerate suspected offenders. Fairness, not expedience, is the touchstone of our criminal justice system. Few if any constitutional liberties will "pay their way" in terms of prosecutorial efficiency; they exist to make criminal prosecutions fair and just, not cheap and easy."

The Kentucky Supreme Court noted that in Escobedo v. Illinois, it had stated:

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the `confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.[112]

The Kentucky Supreme Court agreed that, in the past, it had equated Kentucky's interpretation of right to counsel, in section 11 of the Kentucky Constitution, to be equivalent to that guaranteed by the Sixth Amendment, that did not mean it was an "immutable rule of law." It further noted "maintaining and protecting the integrity of the attorney-client relationship is an important public policy of this Commonwealth." The Rules of Evidence and the Rules of Professional Conduct support this.

The Court continued:

> Linehan and Jackson reinforced the attorney-client relationship guaranteed by Section 11 and nurtured by Kentucky public policy by barring the police from interceding between the accused and his attorney after formal prosecution had begun. The Montejo court, by discounting the social value of the attorney-client relationship in a cost-benefit analysis, completely disregarded the unavoidable deterioration of the right to counsel that results when prosecuting authorities are permitted to send police interrogators to conduct custodial interviews with accused persons about the pending charges without the knowledge of their attorneys.

The Court agreed nothing in its current decision barred "the use of evidence obtained when the defendant initiated the conversation with police." The Kentucky Supreme Court stated it had to reassess its usual adherence to interpretations of the Sixth Amendment by the federal courts as binding law, and noted, it did so in this case "because of the Supreme Court's abrupt recalibration of its perception of the Sixth Amendment."

In conclusion:

> Based upon the foregoing considerations, [the Court] reaffirm the rationale of Linehan as a manifestation of the right to counsel under Section 11 of the Kentucky Constitution. In summary, once the right to counsel has attached by the commencement of formal criminal charges, any subsequent waiver of that right during a police-initiated custodial interview is ineffective. "Police and prosecutorial authorities are at liberty to question a willing suspect about new offenses without regard to whether there is prosecution pending on other charges, whether similar or different in nature, but they must be cognizant that the evidence thus obtained may not be used to incriminate him on pending charges wherein he is represented unless his counsel is present."

[112] 378 U.S. 478 (1964).

The Kentucky Supreme Court reversed the Kentucky Court of Appeals and reinstated the Graves Circuit Court's original decision in the case, which disallowed the admissions taken regarding the Marshall County allegations as evidence in the Graves County case. (Admissibility of the statements in the Marshall County case was not before the court.)

NOTE: In this case, the Kentucky Supreme Court elected to uphold a stricter interpretation of Kentucky's Constitution, Section 11, than the U.S. Supreme Court has held in the U.S. Constitution's equivalent provisions, the Fifth and Sixth Amendments. As such, although the U.S. Supreme Court allowed the admission of the information obtained in Montejo in federal cases, as a result of this holding, the Kentucky courts will not admit such confessions, statements or admissions in Kentucky state prosecutions.

Gray v. Com., 480 S.W.3d 253 (Ky. 2016)

FACTS: The Grays (James and Vivian) were shot to death in their Scott County home. Their relationship with their son, James Gray, was tumultuous and that, combined with missing wills that "purportedly disinherited Gray made him an immediate person-of-interest, and ultimately the prime suspect in the official investigation." Some six months later, he was called in to "answer questions ostensibly related to the missing wills." He was given Miranda and agreed to be interviewed.

> After a brief break in the questioning, the investigators shifted gears, deciding to question Gray about his parents' murder. Five-and-a-half hours of unrecorded interrogation followed. Investigators used a number of different ruses and forms of trickery, including a forged lab report of DNA evidence linking Gray to the murders and an alleged phone call from a judge threatening the certain imposition of the death penalty if Gray did not confess to them. Shortly after the interrogation ended, the cameras came back on and Gray confessed to murdering his parents. He was promptly arrested.

Gray moved for suppression and was denied, although the trial judge was 'admittedly troubled" by the situation. That trial ended in mistrial but he was convicted in a second trial. He then appealed.

ISSUE: Is falsifying a document to entice a confession coercive?

HOLDING: Yes

DISCUSSION: The Court began by noting that "police trickery is not new to our criminal procedure jurisprudence, but today's actions exceed any reasonable leeway our case law has previously afforded law enforcement." The Court agreed that ""coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."

> Under Kentucky law, we evaluate the voluntariness of a confession using a three-part test. In determining whether a confession was coerced, a court considers: (1) whether police activity was objectively coercive; (2) whether the coercion overwhelmed the will of the defendant; and (3) whether the defendant has shown that the coercive activity was the "crucial motivating factor" behind his confession.[113] Under the totality of the circumstances, and "no set of criteria is defendant-specific, such as the defendant's age, intelligence, education, criminal experience, and criminal and mental condition at the time of the interrogation. Another set of criteria requires us to consider methods employed in the interrogation itself, including whether there was any physical or mental coercion, threats, promises, delay, and the extent of trickery and deception used in questioning.

[113] Benjamin v. Com., 266 S.W.3d 775 (Ky. 2008).

In Springer v. Com., the Court refused "refused to suppress a confession because "the mere employment of a ruse, or 'strategic deception,' does not render a confession involuntary so long as the ploy does not rise to the level of compulsion or coercion."[114] In essence, we have refused to hold that intentional police misinformation by itself makes a confession involuntary." In this case, however, the police used "falsified documents purporting to represent the official results of a state-police lab's DNA examination." Gray alleged that in the middle of the interrogation, "an officer claimed to have received a phone call from the judge, who threatened use of the death penalty against Gray if he did not confess." His confession itself was "filled with statements that suggest he did not truly believe he committed the crime." The trial court had looked at the evidence[115] and ruled it was not sufficiently coercive, but the Court disagreed, noting that the "hours of manipulation and fabricated evidence can be nothing other than coercion that overbore Gray's free will."[116] Although in the past, the Court had accepted "statements deceptively overstating the evidence" – this was the first time it had been faced with falsified DNA reports.

The Court looked at similar situations from other states and "while we cannot declare all uses of fabricated documents inherently coercive, we are highly suspicious of this practice, especially when the document misrepresents scientific or DNA evidence against a criminal defendant."

The Court continued:

> Although we must decline to adopt for Kentucky a bright-line rule that the use of falsified documents is objectively coercive in all situations, we think the risk of constitutional infirmity is so severe that a petitioning defendant is entitled to a presumption in his favor. As is the case with other constitutional liberties, here we must place the burden on the Commonwealth to prove it did not abuse its power. When a criminal defendant, like Gray, can establish that the police use falsified documents to induce a confession, we will presume this tactic is unconstitutional until the Commonwealth can firmly establish that the document(s) did not overwhelm the defendant's will and was not a critical factor in the defendant's decision to confess.

Looking at Gray's specific situation, the Court agreed the coercion overwhelmed his will and convinced him of the "futility of maintaining innocence." The tactics were the "crucial motivating factor" behind the confession, which further indicated that he had no memory of committing the crime but that they'd convinced him that he had done so. Despite the attempt to argue that the false document was in fact, so poorly done, that he should have realized it was fake was to no avail, the Court noted that "Gray is a mechanic with limited education; it assumes too much to think he would be able to distinguish at a glance a counterfeit KSP lab report from an authentic one. Our operative assumption should not be an expectation that citizens should distrust everything law enforcement tells them or shows them. The contrary should be true. Ordinarily, when a police officer presents a lab report purporting to represent DNA evidence of criminality, one likely does not carefully examine the contents for detailed accuracy. To us, it seems in this case that the overwhelming weight of false evidence brought forth against Gray directly prompted his confession that day at the sheriff's office."

The Court further agreed that the admission of the confession was not harmless error, and likely led to his conviction.

The Court noted that:

> … the police here admit to all of the allegations Gray asserts except the alleged phone-call threat from the judge. Essentially, law enforcement does not attempt to refute Gray's account of the interrogation, but instead, urges us to endorse their deceptive tactics for obtaining his confession. But we find the tactics employed by law enforcement in this case constitutionally unjustifiable, and

[114] Springer v. Com., 998 S.W.2d 439 (Ky. 1999).
[115] Anti-sweating law: KRS 422.110 ("no peace officer or other person having lawful custody of any person charged with crime, shall attempt to obtain information from the accused concerning his connection with or knowledge of crime by plying him with questions, or extort information to be used against him on his trial by threats or other wrongful means, nor shall the person having custody of the accused permit any other person to do so.").
[116] It discounted the alleged phone call with the judge, however, as likely false.

> our steadfast fidelity to the federal and state Constitutions directs us to condemn them. Harmless misdirection and simple ruses may be constitutionally permissible in some situations, but use of false statements and phony lab reports as the sole basis for hours of unrecorded interrogation offends the guarantee of due process of law. Because we conclude that the weight of false evidence against Gray and the pressures exerted by interrogating officers overwhelmed his conscience, the trial court's decision to deny suppression was error. The confession should have been excluded from trial. We reverse the judgment and remand the case to the trial court for further proceedings consistent with this opinion.

The Court also addressed several other issues, in anticipation of a retrial. Gray argued that he should have been permitted to introduce a witness who was to criticize the police investigation. However, the proposed expert witness was a retired police officer from another state who now works as a private investigator. The Court denied his qualifications as an expert, as he had "o published works or peer-reviewed articles or any other professional credentials beyond his years of law enforcement experience and his subjective view of the investigation." Although the Court agreed that "under Kentucky's relatively liberal standard," he could likely be qualified, as he had thirty years of experience as an investigator. However, he "offered no objective methods or principles for the basis of [his] opinions other than his own subjective experiences with crime scenes across the span of his career as a police officer." As such, he could provide "no specialized knowledge" that would assist the jury.

Estes v. Com., 2016 WL 2605269 (Ky. 2016)

FACTS: On July 20, 2009, Megan Brooks called to report her mother was dead. Arriving Mercer County authorities found the body lying on the floor with a plastic bag around the head. "The bedroom scene suggested that a struggle had occurred. The autopsy revealed bruises on the victim's hand, leg, knees, neck, shoulders, and inside of the scalp. Scrapes were found on the side of her nose and on her knee. DNA collected from beneath the victim's fingernails implicated" Estes – Megan's boyfriend. He confessed his involvement, admitting that he and Megan had smoked crack that night and decided they wanted to start a life together. Needing money, he claimed Megan coaxed him to kill her mother for the insurance money. He suffocated her with a pillow and Megan added the plastic bag to be sure. Estes's fingerprints were also found on the bag.

Megan had entered a Manslaughter plea, but claimed that she came home after a night of doing drugs and found her mother dead. However, several former cellmates testified that she'd made statements that corroborated Estes' story. Estes was convicted and appealed.

ISSUE: Is the validity of a confession judged on the totality of the circumstances?

HOLDING: Yes

DISCUSSION; In addition to other issues, the Court noted that Estes, "with counsel present, conversed with police about the crime soon after his arrest." "The trial court determined that Estes' statement was made knowingly, voluntarily, and intelligently; the statement was made without coercion or promises, other than the Commonwealth's assurance that it would not seek the death penalty." The lawyer who was with him testified that he advised him against making a statement at all, "but that if he did, a truthful statement would remove the possibility of the death penalty." Estes argued he would not have given the statement if advised against it and that he was "following non-verbal cues from his lawyer when he told the detective that his statement was voluntary."

The Court continued:

> To determine whether a confession was coerced, and hence, involuntary, we consider the totality of the circumstances, including "1) whether the police activity was 'objectively coercive;' 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police 17 activity was the "crucial motivating factor" behind the defendant's

confession."[117] Upon review of the circumstances, we conclude that Appellant's statement was not the product of objectively coercive police activity. By all reasonable accounts, Appellant's confession was voluntary. The trial court properly denied Appellant's motion to suppress.

Estes's convictions were affirmed.

Com. v. Holleran, 2016 WL 2894050 (Ky. App. 2016)

FACTS: Det. Flannery (Lexington PD) was notified by an out of state officer **"**that a juvenile in his jurisdiction had been having sexual conversations with an individual on the Internet whose IP address originated in Lexington, Kentucky." On March 13, 2012, he and Det. Shearer went to the Bailey home, where the IP address was registered. They were dressed in soft clothes and badges visible, to do a knock and talk. Holleran answered their knock and admitted them to the house, the kitchen. He originally said there was only one laptop in the residence, which was produced and found to have a broken screen. "During the conversation, Holleran admitted he had used a fake Facebook account to communicate with several juveniles, including the juvenile from Illinois. Holleran then took the detectives to his bedroom, where the Detectives found a fully functioning desktop computer. The Detectives also discovered several envelopes with return addresses of females from several states, including the juvenile from Illinois."

They returned to the kitchen and Det. Flannery asked if he would do a written consent to search. He was given no indication he was under arrest and the form indicated he did not have to consent. Holleran signed the form.

> Upon completion of the search, Det. Flannery advised that he would like Holleran to complete a consent form to allow the Detectives to remove from the bedroom the desktop computer, envelopes, and a notebook and take them to the police station. Holleran completed the consent form. Det. Flannery then asked Holleran to accompany him to the police station to talk about Holleran's communications with the juvenile in Illinois. Holleran consented and was driven by another police officer to the police station. Holleran was then placed in an interview room. According to Det. Flannery, Holleran was not in custody or under arrest. At the outset of Det. Flannery's questioning he presented Holleran with a consent form to search the computer taken from Holleran's bedroom which authorized a forensic examination of the computer. Det. Flannery gave Holleran an opportunity to read over the consent form. Holleran indicated he understood it and then signed it. In answering a series of questions from Det. Flannery, Holleran stated he had no mental or physical impairments and that he made it to college but failed out during the first year. Holleran also answered in the affirmative that he arrived at the police station willingly. Det. Flannery testified that during this questioning he did not notice if Holleran had any mental deficiencies beyond a possible speech impediment. Det. Flannery then read Holleran his Miranda Rights. When questioned by Det. Flannery whether he understood his Miranda Rights and if he would be willing to answer questions, Holleran answered "yes" to both questions and he signed a Miranda waiver. At no time thereafter did Holleran ask to end the interview or invoke his Miranda rights. Holleran was also presented with consent to assume online identity, which authorizes law enforcement to take over online contact and social networking accounts to assist in official investigations.
>
> Holleran signed the consent form. The interview continued after that with questions about Holleran's online activities. When the consent to search the computer was given by Holleran, Detective Jim Barber ("Det. Barber"), a computer forensic examiner, began investigating the contents of the bedroom computer. During his search, Det. Barber found an image of a juvenile between the ages of 10 and 12 with exposed genitals. Det. Barber's search ended at that point and he alerted Det. Flannery in the interview room of the image. Det. Flannery instructed Det. Barber to print out a redacted version of the image and bring the printout to the interview room. Det. Flannery presented the printout to Holleran who acknowledged he had seen it and that he had received it from a foreign individual. At the end of the interview, Mr. Holleran was arrested for

[117] Henson v. Com., 20 S.W.3d 466 (Ky. 1999).

and charged with one count of Possession of Matter Portraying Sexual Performance by a Minor. He was transported to the Fayette County Detention Center. As Det. Flannery took Holleran to the Fayette County Detention Center transport unit, Holleran made a statement indicating he would like to talk more to Det. Flannery. Det. Flannery advised he did not have time to talk at that time, and said that he would visit Holleran the following day at the jail.

Pursuant to a search warrant, the computer was searched and evidence found. Holleran had been released and he was then arrested for images and videos found on the computer. He was again given Miranda and placed in holdover.

Holleran then indicated he wanted to talk to Det. Flannery but he did not want to go to jail. Det. Flannery told Holleran he would not ask him any questions since his right to an attorney had been invoked. Det. Flannery then left to pick up a record because Holleran made statements that he would like to talk to him. He returned to the holdover cell 10 to 15 minutes later. A sergeant joined Det. Flannery. Det. Flannery told Holleran that he could not make the decision for him to talk or not. Det. Flannery also advised that he would not ask Holleran to talk because that would be coercion. Holleran responded that he did want to talk but he did not want to go to jail. Det. Flannery told Holleran that once he was arrested the decision of whether Holleran would go to jail could not change.

Det. Flannery advised Holleran that they were there to speak with him because Holleran had indicated a willingness to talk but that he, Det. Flannery, could not make that decision for him. Det. Flannery said they would stop talking with Holleran since he had invoked his right to counsel but he would listen if Holleran wanted to talk. This discussion continued with Holleran making comments that he did not want to go back to jail. Det. Flannery told Holleran he needed to make a decision about whether he wanted to and reminded him that he had indicated a desire to do so the day before and again after invoking his right to counsel earlier that day. Holleran then stated he would like to talk. Det. Flannery asked if he was sure. In response, Holleran asked if he had a choice, which Det. Flannery said he did.

Holleran then asked if he would still get an attorney if he chose to talk. Det. Flannery responded that talking now would only give away the right to an attorney right then but would not mean he gave up his right to an attorney later on. Holleran said he would like to talk. Det. Flannery initiated questioning of Holleran. At the end of the discussion, Holleran was charged with four counts of Possession of Matter Portraying Sexual Performance by a Minor.

At the subsequent arraignment and a hearing regarding his mental competency, he was found to be mildly mentally retarded with a low level of literacy. He was, however, found competent to stand trial. He moved for suppression, however, "arguing that he did not knowingly or intentionally waive his Miranda rights or consent to the search of his property." A defense expert testified concerning the "Standardized Assessment of Miranda Abilities (SAMA) to test Holleran and concluded that Holleran lacked the mental capacity to fully understand his waiver of the Miranda rights." The Court partially granted the request, admitted his initial statements at the house put suppressing the statements made at the police station, on both days, finding he did not knowingly and intelligently waive his Miranda rights, nor did he voluntarily sign the consent forms.

The Commonwealth appealed.

ISSUE: Is an intellectually disabled person possibly incapable of giving consent to be interrogated?

HOLDING: Yes

DISCUSSION: The Court first looked at the initial interrogation at the station, where he was transported by a uniformed officer. The Commonwealth argued he was not in custody and that warnings were not needed but in the alternative, he did validly waive any rights under Miranda. The Court observed that

"Detective Flannery told Holleran that the Detective wanted Holleran to go with the police to the police department for questioning, and Holleran complied. Holleran was transported to the police department in the backseat of a police cruiser with doors that only opened from the outside and then was escorted to an interrogation room equipped with a recording device. It appears that Holleran was never left unattended at the police station. Moreover, the interrogation at the police department could not be categorized as cordial or neutral; rather, Detective Flannery's questioning was accusatory and at times belligerent.[118] Based upon the objective circumstances, we agree with the circuit court that a reasonable person would not have felt that he was free to leave and that Holleran was subjected to custodial interrogation at the police department on March 13.[119] With respect to his waiver, and based upon the trial court testimony, the Court agreed that "Holleran lacked the intelligence and mental capacity to make a knowing and intelligent waiver of his Miranda rights." As such, his statements were properly suppressed. He would have continued to lack the capacity the next day, and further, he requested counsel and his interrogation should have ceased.

With respect to the search, the Court agreed that the consent "as involuntary due to implied coercion. In reaching this decision, the circuit court considered Holleran's limited mental capacity coupled with the adamant "insistence of the officers." The Court upheld the suppression as well.

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

Phillips v. Com., 2010 WL 2471669 (Ky. App. 2016)

FACTS: On October 18, 2007, Phillips and Glodo "got into an extended and heated argument." They relocated their argument since there were children at the house. They ended up in a nearby parking lot in Laurel County, where Phillips shot Glodo in the back of the head with a shotgun.

Phillips later a statement "in which he claimed, inconsistently, that the shooting was both accidental and done in self-defense." Phillips was indicted for wanton murder and convicted. He appealed.

ISSUE: Is evidence found to be non-exculpatory or material required to be provided under Brady?

HOLDING: No

DISCUSSION: In his post-conviction appeal, "Phillips contended that the Commonwealth wrongfully suppressed seven pages of an investigator's field notes taken during an interview of Phillips at the scene on the night of Glodo's death. Phillips argued that the field notes contradicted the Commonwealth's theory that Phillips shot Glodo intentionally, instead supporting his assertion of self-defense. Phillips's motion also asserted that the Commonwealth intentionally withheld an x-ray held by the Kentucky Medical Examiner which, according to Phillips, contradicted the conclusion that Glodo was shot squarely in the head. Rather, Phillips contended that the x-ray demonstrated that the shooting was accidental." The trial court had "concluded that the field notes were either not discoverable or inadmissible, and Kentucky Rules of Criminal Procedure. therefore not wrongfully suppressed." It had further concluded that the x-ray was not held back in bad faith and would not have changed the outcome. Finally, he argued that the "Commonwealth withheld a Request for Evidence Examination form containing an investigator's handwritten notes."

Phillips argued that the items in question were "exculpatory and contrary to the Commonwealth's theory of the case; hence, he argues that the Commonwealth withheld them in violation of Brady v. Maryland,"[120] In Brady, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Later cases had "emphasized that such evidence must be material. "[F]ailure to disclose [such evidence] constitutes reversible error only when there is a reasonable

[118] See Peacher v. Com. 391 S.W.3d 821 (Ky. 2013).
[119] See Com. v. Lucas, 195 S.W.3d 403 (Ky. 2006).
[120] 373 U.S 83 (1963).

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[121]

Looking at each of these in turn, the Court agreed that the X-ray issue had already been litigated, despite the fact he had acquired a new affidavit concerning it. With respect to the field notes, following the interview, Det. Loomis had "completed a request for physical examination – specifically, latent fingerprinting – upon which he wrote, "[b]e sure to check the area toward the end of the barrel of [the shotgun]." Phillips argued that Glodo had reached for the shotgun causing it to go off, while the Det. Testified that "Phillips told him during their interview that the shotgun discharged when Phillips twice shoved Glodo off of him using the shotgun. Phillips contends that the Commonwealth's suppression of Detective Loomis's field notes and request form hampered his ability to impeach Detective Loomis, cross-examine the fingerprint examiner, and generally prove his version of events to the jury." The Court Noted, however, that under Cavender v. Miller, that a defendant was entitled only to a copy of his statement to police, not the "the mental impressions or other ideas of the officer."[122] The Supreme Court has also denied a defendant's request for "all investigative reports of police and statements of witnesses."[123] The field notes in question "fit squarely within the evidence excluded under RCr 7.24(2)." The evidence form included "Detective Loomis's handwritten instruction regarding which items, and which parts of those items, should be examined. Both documents were clearly excepted from pretrial discovery under RCr 7.24(2).[124] Other information in the notes, as to possible witnesses, were already known to Phillips.

The Court agreed that overall, the information withheld was neither material nor exculpatory, and upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Dunn v. Maze, 485 S.W.3d 735 (Ky. 2016)

FACTS: In 2008, Dunn was charged with multiple counts of sodomy with a minor victim, in Montgomery County. Each of the counts read the same. At trial, the minor victim described in detail five instances of anal sodomy, including an approximate time and the circumstances. He testified to a lesser degree about two instances of oral sex. "Though there was ample testimony that would have allowed the jury to distinguish between the various incidents, at least as to the anal sodomies, the jury instructions on all seven counts were worded identically." He appealed, but did not initially complain about the issue that the jury instructions which "failed to factually differentiate between the counts, despite clear law holding such failure to be reversible error.[125] The trial court denied. The Court of Appeals vacated his convictions and remanded. Dunn moved to bar the retrial on several issues and was denied. Following adverse procedural rulings, Dunn appealed to the Kentucky Supreme Court.

ISSUE: Are carbon copy jury instructions (which do not differentiate between individual charges) allowed?

HOLDING: No

[121] U.S. v. Bagley, 473 U.S. 667 (1985).
[122] 984 S.W.2d 848 (Ky. 1998),
[123] Moore v. Com., 634 S.W.2d 426 (Ky. 1982).
[124] RCr 7.24(2) states: On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision authorizes pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of thecase, or of statements made to them by witnesses or by prospective witnesses (other than the defendant).
[125] *See* Miller v. Com., 283 S.W.3d 690 (Ky. 2009) ("Mt is now settled that a trial court errs in a case involving multiple charges if its instructions to the jury fail to factually differentiate between the separate offenses according to the evidence.").

DISCUSSION: Dunn argued that he was subjected to double jeopardy and because "he was acquitted on two of the seven identically worded counts, he could not be retried on the remaining five counts." His claim was, in essence, that because the counts were identically worded, it could not be known whether the counts to be retried are ones that have already resulted in an acquittal. Kentucky has not addressed this issue, though it has hinted that identically worded "carbon copy" jury instructions contain a double-jeopardy problem.[126] Other jurisdictions have specifically held it to be double jeopardy, however.

Due to the unusual procedural posture of the case, the Court first had to determine if it was appropriate to take up the matter at this point. In this case, the Court concluded, it was a matter of potential successive prosecutions and it was appropriate to take the case, as the protections of the double jeopardy amendment "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken."

The Court agreed that when "generic counts are used" … "we cannot be sure what factual incidents were presented and decided by this jury."[127]

The Court continued:

> At the time of the first trial, any double-jeopardy problem is only a potential one. As discussed above, such double-jeopardy issues are not ripe until a second prosecution is pursued. And that problem, while obviously related to due-process concerns, is distinct from any due-process problem. The due-process error is a present problem; any double-jeopardy problem is a future one. Thus, the instructions and jury verdicts have an existing defect affecting the defendant's rights to due process, but they also have the latent defect related to the defendant's double-jeopardy rights that can manifest only if there is a reversal of the convictions and a retrial in the future. But in this case, we have arrived at that future. The Commonwealth previously employed a generic, identically worded multiple-count indictment. The trial court then used generic, identically worded jury instructions on those counts. The jury returned a mixed verdict on those counts. And the Court of Appeals reversed the convictions on error conceded by the Commonwealth. The Commonwealth now seeks to prosecute Dunn a second time.

The Court agreed that "a new trial in this case raises a substantial risk that Dunn will be tried for crimes for which he has already been acquitted, thereby violating his double-jeopardy right against successive prosecution. For that reason, the order of the Court of Appeals denying Dunn's petition for a writ of prohibition is reversed, and this case is remanded to the Court of Appeals to issue a writ in conformity with this opinion."

TRIAL PROCEDURE / EVIDENCE – MISSING EVIDENCE

Garland v. Com., 458 S.W.3d 781 (Ky. 2015) (HELD OVER FOR FINALITY)

FACTS: Garland was charged with the 1997 murders of Ferrier, Conaster and Boswell, in McCreary County. Following his convictions, he moved to obtain DNA testing and analysis of certain items of evidence. That motion was denied and he appealed. The Supreme Court reversed the denial and remanded the case for an evidentiary hearing. At the hearing the Court was told what was known about the substances that had been ordered to be tested, and none of the information proved exculpatory to Garland. However, one of the requested items (fingernail clippings from one of the victims) had been discarded 14 years before, right after Garland's trial, by the detectives involved. At the time, KSP's policy was to destroy any evidence without evidentiary value, which was indicated because they were not used at the trial. The Court found this destruction occurred despite the trial court entering a "no-destruction order" two years before – but further noted that KSP did not receive that order. There was also no form documenting the destruction of the items, as was the norm. Garland moved for a new trial,

[126] *See* Miller v. Com., 283 S.W.3d 690 (Ky. 2009) (noting that the issue with such instructions may be "viewed as one of ... double jeopardy," among others (quoting Miller v. Com., 77 S.W.3d 566 (Ky. 2002)))
[127] Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005).

arguing that KSP had acted in bad faith by destroying the evidence. The trial court denied that, and Garland appealed.

ISSUE: Is destroyed evidence always considered exculpatory?

HOLDING: No

DISCUSION: The Court noted that because he failed to pursue the issue originally, his objections were waived – he effectively abandoned any interest in DNA testing of the clippings. The Court agreed that "the destruction or mishandling of evidence" … could result in a claim, but it required that it be done in bad faith.[128] To make a due process case in destroyed evidence, the Court noted that first, it must be shown there was bad faith, second, that the exculpatory value was apparent before the destruction and third, that the evidence was, at least somewhat, irreplaceable.[129] Garland had conceded the clippings had "no known exculpatory value" when destroyed, but that they certainly had the potential to be. He had maintained his son committed the murders and certainly, finding his son's DNA in the fingernail clippings would have refuted his own testimony that he was a passive witness. However, he failed to satisfy the first prong, bad faith. Clearly, the evidence showed, they were simply following KSP protocol in the destruction.

The court upheld the trial court's decision.

Lanham v. Com., 2016 WL 2605627 (Ky. 2016)

FACTS: Between January 15 and September 8, 2012, Lanham "committed a series of sexual assaults and other sex crimes against three minor girls" in Jefferson County. One, Amy, was less that 12 at the time, with two other girls, Heather and Elizabeth, being less than 16. Another girl witnessed the sex acts involving Amy.

Lanham was arrested and indicted, and his home was searched. Evidence was found corroborating the assault claims, including a miniature baseball bat which Amy claimed was used to penetrate her. A picture of the bat was provided but the bat itself was missing. Lanham was charged with Rape, Sodomy, Promotion a sexual performance by a minor, Sexual Abuse and Distribution of obscene matter. He was convicted and appealed.

ISSUE: Is missing evidence necessarily subject to a missing evidence instruction?

HOLDING: Not necessarily

DISCUSSION: Lanham argued he should have been given a missing evidence instruction for the bat. The Court noted that:

> In order to establish a due process violation, the evidence must either be intentionally destroyed, or destroyed inadvertently outside normal practices."[130] "Furthermore, the lost evidence must 'possess an exculpatory value that was apparent before it was destroyed.'"[131] The photograph of the bat that was presented to the jury contained a measuring device that was situated alongside the bat in order to demonstrate scale. However, the units of measure are difficult to discern from that photo. During deliberations, the jury posed the question: "how many centimeters are in one inch?" Lanham claims that this is a clear indication that the jury was confused as to the bat's dimensions. The court responded to the jury: "you have all the evidence that you are going to receive in this matter.

[128] California v. Trombetta, 467 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988).
[129] McPherson v. Com., 360 S.W.3d 207 (Ky. 2012).
[130] Tamme v. Com., 759 S.W.2d 51 (Ky. 1988).
[131] Id. (citing California v. Trombetta, supra.)

Further, during the testimony of Dr. Fitzer, who did the sexual assault exam of Amy, she noted that Amy's exam was normal. However, she noted she "would not necessarily expect to see physical signs" of the assault, which had occurred a month before, since the body would have healed. The missing bat had, however, contained both Amy and Lanham's DNA.

With respect to the missing evidence, a LMPD property room supervisor testified that the bat and two cigar tubes had been logged in as evidence and not logged out, but they could not be located. (The cigar tubes were also evidence in the case.) The Court found no indication that they were missing due to anything beyond negligence, nor was there any evidence that there was any exculpatory evidence involved.

Further:

> Any negligence or inadvertence on the part of the Commonwealth or the LMPD negates a finding of bad faith.[132] Lanham has failed to present evidence that the alleged omissions of the Commonwealth and/or the LMPD in failing to present the bat at trial were intentional or done in bad faith. Nor does his unsupported claim of "extreme negligence" satisfy this standard. Therefore, a missing evidence instruction was not warranted.

Lanham also argued it was improper to allow a detective to testify as to how often such "delayed disclosure" situations occur, and the detective agreed it was more common to have such disclosures made delayed, and the prosecutor further referenced the detective's statement in closing. He argued this implicated, indirectly, the "child sexual abuse syndrome" that had previously been discussed in King v. Com.[133] However, given the short reference, and although perhaps error, the Court did not find it to be manifest injustice.

Lanham's convictions were affirmed.

Com. v. Parrish, 471 S.W.3d 694 (Ky. 2015)

FACTS: On November 18, 2010, shortly after midnight, Officer Cobb (Nicholasville PD) stopped Parrish's vehicle for failing to stop at two stop signs and another minor violation. He smelled alcohol and Parrish admitted to three drinks within the 30 minutes before. Parrish performed FSTs "with some proficiency" but Officer Cobb noted some "signs of impairment." The officer administered a PBT and "showed the level reading to his" dash cam. He also noted on the citation the presence of alcohol on the PBT, but did not record the number. Parrish was arrested for DUI. At the jail, the Intoxilyzer was 0.086, within an hour of the stop.

Prior to trial, Parrish's attorney did not make a formal discovery request, only an "informal" one, for the dashcam video, but was told it did not exist. At the trial, Officer Cobb testified he did not know why it was unavailable and described what was normally done – which was that it was the responsibility of the evidence clerk to produce the videos if requested. (He did not know until the day of trial that had not been done.) He could not recall the exact number, but remembered the PBT did register alcohol, but admitted it could have been less than 0.08. He was not allowed to testify to scientific details about Parrish's argument concerning extrapolation.

Parrish was convicted of DUI per se (due to the Intoxilyzer number) and the Court noted that it could not judge the extrapolation defense without "clear scientific evidence" which was not presented. The Court did this with "full awareness of the missing video." Parrish appealed and the Circuit Court, and eventually the Court of Appeals, reversed his conviction, finding that the missing video constituted bad faith. (Specifically, the Circuit Court indicated that the officer "intentionally did not record the evidence when he saw it was below .08.)

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[132] Ordway v. Com., 391 S.W.3d 762 (Ky. 2013) ("[w]hen it is established that the evidence was lost due to mere negligence or inadvertence, which, in effect, negates a finding of bad faith, the missing instruction should not be given.")
[133] 472 S.W.3d 523 (Ky. 2015).

ISSUE: Is missing evidence necessarily a Brady violation?

HOLDING: No

DISCUSSION: Parrish argued that the "PBT result was admissible and potentially exculpatory evidence" and that the "police either destroyed or failed to preserve the only record of the result: the dashboard video." The Court first looked at whether the missing evidence constituted a Brady violation.[134] It looked to Arizona v. Youngblood, in which it was held that the defendant "must prove when the government fails to collect or preserve evidence, holding, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'" In other words, when the Commonwealth "merely fails to collect or preserve evidence … the defendant must prove bad faith." Negligence is not enough.[135]

The Court found no evidence of bad faith. Officer Cobb assumed the process was working as designed, with the dashcam turned on as the lights were activated, as they were. He purposefully showed the PBT to the camera for that reason and was himself curious as to why it was not produced. In fact, even defense counsel, in his arguments, did not argue bad faith, and made no attempt to trace the custody of the missing video. Further, the video was known to the defense prior to trial, and it was discussed at trial, and as such, there was no Brady violation.[136] No attempt was made to address the issue before or during trial, and after the fact, it was not proper to address it.

The Court reversed the lower courts' decisions and reinstated Parrish's conviction.

TRIAL PROCEDURE / EVIDENCE – RECORDINGS

Com. v. Sharp, 2016 WL 3574609 (Ky. App. 2016)

FACTS: Sharp was indicted for trafficking in controlled substances in Campbell County, after a series of controlled buys between a CI and Sharp. The Commonwealth learned before trial that the informant intended to invoke his Fifth Amendment privilege against self-incrimination and asked for a ruling. Sharp moved to exclude the recordings made of the buys, since he would be unable to cross examine the witness. The trial court permitted the informant to invoke the right and granted Sharp's motion to exclude the recordings. The Commonwealth appealed.

ISSUE: If recorded statements provide context, are they admissible?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court looked to Turner v. Com., for guidance, the Court noted that "where the informant's recorded statements provide context for the defendant's statements, such statements serve a valid non-hearsay purpose." [137] As such, Crawford would not apply.[138]

The Court agreed it must look to the "exact content of the statements" as that is "essential to determining whether the recorded statements should be admitted or excluded from evidence under the Confrontation Clause." In this case, the recordings of the buys were not placed in the record, so the Court could not review them. The Court agreed that the Court was not clearly wrong to exclude the recordings under the Crawford doctrine.

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[134] Supra.
[135] Collins v. Com., 951 S.W.2d 569 (Ky. 1997).
[136] Bowling v. Com., 80 S.W.3d 405 (Ky.2002); U.S. v. Agurs, 427 U.S. 97 (1976) – Brady applies to the discovery, after trial, of information which had been known to the prosecution but unknown to the defense."
[137] 248 S.W.3d 543 (Ky. 2008).
[138] Crawford v. Washington, 541 U.S. 36 (2004).

TRIAL PROCEDURE / EVIDENCE - HEARSAY

Jackson v. Com., 2016 WL 2604841 (Ky. 2016)

FACTS: In 2011, police received several anonymous tips that Jackson and his girlfriend, Roberts, were selling drugs out of their apartment. They set up surveillance of the apartment, during which officers observed activity that, in their experience, was characteristic of drug trafficking: heavy visitor traffic to the apartment, brief visits, and suspicious interactions between Jackson and visitors outside the apartment. Based on the information provided by the anonymous tipsters and the officers' own observations, police obtained a warrant to search the apartment. Police executed the warrant and found a quantity of cocaine, hydrocodone pills and about $2,000 in cash. Jackson admitted that the contraband was his. Police apparently found no evidence of personal drug use by the couple. Jackson was arrested and later interviewed by police. During his interview, he admitted to having had a bag containing ten grams of cocaine on his person and about one gram of cocaine in his bedroom at the time of the search. (It was later confirmed to be much more.) He admitted that the drugs and money were his and that he had sold cocaine, purportedly outside the apartment only, not inside it. He denied any involvement by Roberts in his drug-dealing. The recorded interview was played at trial. Jackson was charged with Trafficking 1st (cocaine) and Possession 2nd (hydrocodone).

He was convicted of trafficking and appealed.

ISSUE: Is hearsay testimony beyond what is necessarily to put a police action into context admissible?

HOLDING: No

DISCUSSION: Jackson argued that the "testimony from police officers about the substance of anonymous tips they received alleging drug-trafficking activity at Jackson's apartment" was inadmissible hearsay. The Court noted that "hearsay" is any out-of-court statement 'offered in evidence to prove the truth of the matter asserted." KRE 801(c). It is inadmissible unless it falls under a recognized exception to the rule, *see* KRE 801A-804, none of which are applicable here.'"

In this case, the first issue was whether the testimony was, in fact, even hearsay. The Commonwealth explained that the "testimony was properly admitted, not to prove the truth of the matters asserted by the out-of-court tipsters—namely, that Jackson was dealing drugs out of his apartment—but to explain the actions the police took based on those statements, i.e., why they investigated Jackson in the first place.[139] In support of that claim, the prosecution cited to "Kerr v. Com. for the general proposition that 'testimony explaining why a defendant had become a suspect in a drug investigation is relevant to avoid any implication that the defendant was unfairly singled out in the drug sting operation and to explain why the defendant was targeted.'"[140] In doing so, however, the Commonwealth ignored that the Court in Kerr expressly qualified that statement by adding: "It should be sufficient for an officer to testify that he 'acted upon information received' or words to that effect.'[141] The Court further explained that there is "no legitimate need to say or imply that [the defendant] was a drug dealer or that he was suspected by the police department of selling drugs in a particular vicinity." Such testimony, the Court made clear, "crosse[s] the line into inadmissible hearsay." In this case, the tip reflected directly on Taylor's guilt.

The Court continued:

> And in any event, we have difficulty surmising how the officers' reasons for investigating and then arresting Jackson were relevant at all. The Commonwealth does not contend that the statements to police were needed to rebut an explicit charge by Jackson at trial that the officers fabricated

[139] *See* Sanborn v. Com., 754 S.W.2d 534 (Ky. 1988).
[140] 400 S.W.3d 250 (Ky. 2013).
[141] Id. at 257 (quoting Gordon v. Com., 916 S.W.2d 5 176 (Ky. 1995))

> their testimony.[142] Yet to the extent that they may have had some relevance "to avoid any implication that the defendant was unfairly singled out in the drug sting operation and to explain why the defendant was targeted,"[143] as the Commonwealth contends, we reiterate that testimony to the effect that the officer "acted upon information received" would have sufficed as the preferable, and much more prudent, means to that end. As we emphasized in *Gordon,* "[t]he need for the evidence is slight, the likelihood of misuse great."[144] In sum, there was simply no legitimate or justifiable need to tell the jury that police suspected Jackson of being a drug dealer or that the police suspected that drugs were being sold out of Jackson's apartment based on anonymous tips. This was inadmissible hearsay.

However, and fortunately, the Court concluded that the error was harmless, given that Jackson admitted that he was dealing drugs and made a recorded statement on the issue.

The Court also looked at his assertion that testimony about Jackson's KASPER report (as well as that of his girlfriend) was improper. (The reports indicated neither had filled prescriptions for hydrocodone in 2011.) The Court noted that while improper, it was immaterial, as Jackson was acquitted of the charges related to the hydrocodone.

The Court continued, however:

> That said, we caution the Commonwealth against introducing KASPER-related testimony in the future. Not only is it hearsay which implicates defendants' confrontation rights, but intentional unauthorized disclosures of this data violate the non-disclosure provisions of KRS 218A.202 and are subject to criminal penalties. And in a future case where the taintlessness of the error is less clear, we may be more inclined to find an improper admission of KASPER evidence to be reversible error.

The Court upheld his convictions, but reversed for sentencing issues.

Com. v. McKee, 486 S.W.3d 861 (Ky. 2016)

FACTS: On the evening of December 17, 2004, McKee was driving in Breathitt County when his vehicle collided head on with a vehicle driven by Anthony Wenrick. McKee was not injured, and Wenrick suffered only minor injuries. Wenrick's wife, Michelle Wenrick, who was in the passenger seat, also did not appear to be seriously hurt. But as it turned out, she suffered significant internal injuries from which she died several hours later. When police arrived at the scene, they smelled alcohol on McKee. They administered field-sobriety tests, which McKee failed, and then took him to the hospital for a blood test. That test showed that his blood-alcohol content was .18, well above the legal driving limit. Witnesses in a car behind the Wenricks stated that McKee had been driving without headlights and had crossed the center line into the oncoming lane.

McKee was indicted on Wanton Murder, Assault 4th and DUI. McKee was convicted and lost an appeal. Wenrick appealed, arguing that his trial counsel did not introduce evidence that Anthony Wenrick was also intoxicated. At his subsequent trial, an accident reconstructionist was unable to reconstruct the scene because of the passage of time, and because the initial investigator approached it as a simple crash. (Michelle Wenrick did not appear to be seriously injured at the time.) That officer was not qualified to do an accident reconstruction and did not contact KSP to have one done and "because the matter was treated as a mere traffic accident, the scene was not documented very well, with only a few photographs being taken that night before the vehicles were removed and no measurements being taken of the distances between the vehicles or their exact locations." Upon her death, the officer returned to the

[142] *Cf.* Chestnut v. Com., 250 S.W.3d 288 (Ky. 2011) (holding testimony about statements to police admissible for non-hearsay purpose of proving officers' motive for arresting defendant, which was made an issue in part because defendant accused officer of lying during testimony).
[143] Peyton v. Com., 253 S.W.3d 504 (Ky. 2008),
[144] 916 S.W.2d at 179 (quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook §* 8.05 (3d ed. 1993)).

scene and made a rough sketch, which he used in his final report, but that was not provided to Commonwealth's Attorney. Its existence was unknown until he mentioned it on the stand.

McKee was again convicted and appealed. His DUI was overturned and he continued to challenge his remaining convictions. He was again successful and he was once again remanded for retrial. He claimed his counsel was ineffective, with "the claimed failure to investigate centered on the diagram showing final resting places of the vehicles drawn by Officer Noble." The Court of Appeals concluded that had McKee's counsel investigated the matter independently, such as by interviewing the officer, he "may have discovered this document earlier and been able to provide it to the [reconstruction] expert." The Court noted (incorrectly) that although there was no testimony from a defense accident reconstructionist at the second trial, one had previously been employed to examine the scene of the accident and that the diagram of the scene "may certainly have been of assistance to him in rendering an expert opinion in this matter." The Court also agreed his counsel should have objected to an EMS report that was introduced without testimony or a witness, which "violated McKee's confrontation rights under Crawford v. Washington and Davis v. Washington."[145]

The Court agreed that "McKee did not show that he was prejudiced. At best, he was able to show that an accident reconstructionist *might* have found the diagram useful. But such speculation is insufficient to show prejudice. It is not at all clear that the accident reconstructionist never saw the diagram. The diagram came to light on the first day of trial when Officer Noble was cross-examined and explained that he had included his diagram as part of the accident report that is drafted whenever police respond to a traffic accident. He did not have a copy of the report, which was at the police station and not part of his criminal file, and a copy of it had not been provided to the Commonwealth. A short recess was taken during which copies of this report were obtained. Defense counsel even asked for an additional recess to review the report before proceeding with further cross-examination, and failing that, asked that the report be excluded from evidence. The trial court denied the recess, but allowed the officer to be recalled at a later time. The trial court excluded the diagram itself. Importantly, however, the reconstructionist did not testify until the following day. Thus, there was an opportunity for him to be shown the diagram by defense counsel before testifying. And the accident reconstructionist' s own testimony undercuts the claimed prejudice. McKee's theory is that the diagram, which at the very least showed the final position of the two cars, could have been used to reconstruct the accident. Although that information would no doubt be useful, as attested to by the expert, it would not appear to be sufficient by itself to allow a full reconstruction. Indeed, the reconstructionist testified specifically he was unable to do a reconstruction because he lacked adequate information generally, including information about the pre-impact positions of the car, such as the location of skidmarks and any debris field resulting from the collision, which would not have been disclosed by the diagram. Thus, the diagram alone would not have allowed a full reconstruction of the accident.

With respect to the EMS report, the Court noted that it did not involve testimonial hearsay but were instead statements made by EMS personnel "describing Wenrick's physical condition soon after the wreck. Although those statements may run afoul of the hearsay rules, they do not violate the Confrontation Clause because they are not testimonial.

The Court reversed the lower court and upheld his latest conviction.

Romero-Perez v. Com., 2016 WL 3462241 (Ky. App. 2016)

FACTS: During his prosecution for Burglary and Assault in Fayette County, Romero-Perez sought to disclose information about the immigration/visa status of one of his victims. That victim was currently in the U-Visa program, and the "success of the victim's application depended on a certification that she provided "helpful" assistance to the prosecution." The Court, however, denied Romero-Perez the opportunity to cross-examine the witness about it. He was convicted and appealed.

ISSUE: Is evidence of a witness being in the U-Visa program admissible?

[145] 541 U.S. 36 (2005), 547 U.S. 813 (2006).

HOLDING: Yes

DISCUSSION: The Court agreed that "the fact that the victim's U-Visa application was pending before the trial court was sufficient to support an inference that she might believe that it was in her best interests to testify in the Commonwealth's favor." The Court looked to the history of the U-Visa program that provides a noncitizen temporary relief from deportation during the pendency of the case.[146] He was allowed to ask her "if she had been promised anything or received any benefit in exchange for her testimony," which she denied." The Court agreed that "one can readily see how the U-Visa program's requirement of 'helpfulness' and 'assistance' by the victim to the prosecution could create an incentive to victims hoping to have their U-Visa's granted. Even if the victim did not outright fabricate the allegations against the defendant, the structure of the program could cause a victim to embellish her testimony in the hopes of being as 'helpful' as possible to the prosecution." As such, the victim had reason to believe that "the fate of her U-Visa rested on the testimony she gave at trial" and her success "was dependent on her being a victim of domestic violence." The rights of the witness to keep immigration status out of the jury's view had to be weighed against the defendant's right to effectively cross examine the witness.

However, the Court also noted that the error was harmless as her testimony duplicated that provided by other witnesses and affirmed the conviction.

Robinson v. Com., 2016 WL 3370939 (Ky. 2016)

FACTS: James Robinson regularly visited his brother, Timothy at the mobile home the latter shared with his wife, seven children and a stepchild, Suzie. The brothers were tried as co-defendants on a host of child sex crimes, with five of the children testifying. (Due to the number of children and charges, the facts are convoluted.) At some point, however, Suzie testified that her stepfather had sex with her, but denied having sex with her step-uncle, James. However, her brother, Simon, testified that he witnessed James touching Suzie in a way that indicated he wanted to have sex with her, rubbing her breasts and genitals while she sat on his lap. As a result, James was convicted on that charge.

Other witnesses testified to abuse incidents, in which, for example, James tried to engage in oral and anal sex with the male children. Those actions resulted in multiple charges of the "use of a minor in a sexual performance."[147] James argued that his actions did not fit the statute – as it did not involve a "play, motion picture, photograph, dance, or any other related visual performance." The Court agreed, however, that there could be an "audience of one."[148] Further, the threats to make the boys engage in oral sodomy, by pulling their heads toward his unzipped crotch, was "simulated deviant sexual intercourse" – as covered by the statute.

Further, one of the children was allowed to testify via closed-circuit TV, KRS 421.350.[149] over Robinson's objection, the Court noted that it had "once held the use of closed-circuit testimony in

[146] The Court also noted that if a person gets a U-Visa and stays in the U.S. for three more years, they are eligible for lawful permanent residency, and they are allowed employment status while under the U-Visa. The qualify, the applicant must "(1) "possess specific facts regarding the criminal activity leading a certifying official to determine that the petitioner has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity," 8 C.F.R. § 214.14(b)(3), and (2) [demonstrate that she is] "being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide informationand assistance reasonably requested."

[147] KRs 531.310

[148] Woodard v. Com., 219 S.W.3d 723 (Ky. 2007), overruled on other grounds by Com. v. Prater, 324 S.W.3d 393 (Ky. 2010)

[149] (2) The court may, on the motion of the attorney for any party and upon a finding of compelling need, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

appropriate circumstances constitutional.[150] The U.S. Supreme Court has also held this procedure comports with the Sixth Amendment's requirements, as it "adequately ensures the accuracy of the testimony and preserves the adversary nature of trial."[151] We decline to further address this argument and reaffirm our precedent on this issue."

However, the Court noted, the only evidence upon which compelling need was provided was one of the child's therapists. The Court noted that "in order for a trial court to permit a child to testify outside the presence of the defendant, a nexus must be shown between trauma to the child witness and the presence of the defendant. Therefore, we hold that the trial court abused its discretion in determining that the Commonwealth demonstrated a compelling need for Richard (one of the children) to testify via closed-circuit television, as its holding was unsupported by sound legal principles." [152]

The Court agreed, however, that the error was harmless with respect to convictions involving Suzie, but that it was not harmless with respect to the charges involving the child himself as the victim, as no other proof was offered on the issue. Thus, that particular conviction was reversed.

The Court affirmed most of the convictions.

TRIAL PROCEDURE / EVIDENCE - ALTPERP

Kimble v. Com., 2016 WL 2604730 (Ky. 2016)

FACTS: On May 20, 2011, Corley, a Louisville apartment manager, was on duty when Gray, a resident, came in. "Electrical cords hung from Gray's bloodied arms and wrists" and he was shaken and screaming. He told Corley his girlfriend's cousin had robbed him. Corley called 911 for him and "Gray then told the 911-operator that [Kimble] Charles Kimble had beaten him, tied him to a chair, and held a butcher knife to his throat before leaving with Gray's truck, jewelry, and money. Ultimately, Kimble was charged with Robbery 1st, Kidnapping, Intimidating a Participant and related charges. At trial, Gray testified as to what had occurred. Of particular interest is that at trial, he stated the money taken ($8,000) was intended to purchase a house, while in a letter Gray sent to a TV program, he claimed the money was being saved for his son's college education. Corley testified about Gray's injury and her 911 call was played for the jury. Gray's girlfriend, April, also testified that items were taken from the apartment that belonged to her. The ER doctor testified as to Gray's injuries. Kimble himself testified, admitting that he took the truck (and left it at the bus station) and left the city by bus to go home to Chicago, as he'd become "uncomfortable" staying in the apartment. He was not permitted by the Court to be specific about what had happened to do so, as it would suggest that Gray was involved in drug trafficking.

Kimble was convicted of Robbery 1st, Kidnapping and Terroristic Threatening, and appealed.

ISSUE: Is a claim of an alternate perpetrator that is purely speculative admissible?

HOLDING: No

DISCUSSION: Kimble argued that when the trial court refused to allow him to testify about witnessed drug trafficking, he was denied his right to present a full and complete defense. He argued that it was admissible under "Kentucky Rule of Evidence (KRE) 404(b)(1) because it was relevant to show that the robbery was a result of a drug transaction 'gone bad.'" His argument in his defense was "in essence, is that the proposed testimony would have supported the defense theory that an alternative perpetrator committed the charged offenses." The Court noted that the "proposed testimony concerning the alleged drug transactions was not offered for the purpose of proving Gray's character, but rather to prove that

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…
(5) For the purpose of subsections (2) and (3) of this section, "compelling need" is defined as the substantial probability that the child would be unable to reasonably communicate because of serious emotional distress produced by the defendant's presence.

[150] Com. v. Willis 716 S.W. 2d 224 (Ky. 1986); Price v. Com. 31 S.W. 3d 885 (Ky. 2000).

[151] Maryland v. Craig, 497 U.S. 836 (1990).

[152] Com. v. English, 993 S.W.2d 941 (Ky. 1999).

Gray was a biased witness, to wit, the robbery was the result of a drug deal "gone bad," and Gray named Kimble as the perpetrator to avoid exposing his illegal drug operation."

The Court agreed that a "criminal defendant's fundamental constitutional right to present a defense also includes the right to introduce evidence that an alleged alternative perpetrator, or 'aaltperp,' actually committed the crime.[153] However, later court decisions "strongly suggested that a showing of both motive and opportunity was required to advance an alleged alternative perpetrator theory." Most recently, the Court "clarified this issue emphasizing that the motive-and-opportunity approach is not an "absolute prerequisite" nor is it the only path to advance an alleged alternative perpetrator theory.[154] But … "while the defendant is not required to articulate a precise theory of how the alleged alternative perpetrator committed the crime, it is necessary that the proffered evidence establish a legal or factual basis to support the alternate perpetrator theory. "Speculative" and "farfetched" theories are not sufficient." In this case, the Court agreed, Kimble had insufficient proof to offer and "is attempting to introduce evidence of alleged drug transactions would invite the jury to "speculate about causes not supported by the evidence."[155]

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – JOINDER

Cherry v. Com. , 458 S.W.3d 787 (Ky. 2014) (HELD OVER FOR FINALITY)

FACTS: Between March 18, 2011 and early Sunday, March 20, Cherry allegedly did not sleep, instead using "copious amounts of drugs" during a "bender." During that time frame, he went to a bar with several friends, and "drank alcohol, smoked marijuana, used cocaine, and took prescription pills, including Klonopin." When they arrived at Maudlin's home during the overnight hours, he called his cocaine dealer in an attempt to obtain more. At some point, Cherry called for a taxi and Lemghaili arrived in response. He transported Cherry to the dealer's Lexington home – but then Cherry shot Lemghaili in the back of the head, killing him. Surveillance video caught Cherry leaving the area on foot. He walked to a friend's house and was turned away, and then called Perez, who lived nearby. He was finally able to get Perez to pick him up and return him to the house where he'd started. There, he called his girlfriend, Bates, to pick him up. At Maudlin's home, he retrieved his own pistol and returned Maudlin's revolver, which was used in the murder, a fact only later discovered by Maudlin. Bates picked him up and they returned to her apartment, but during an argument, Cherry fired a shot, which passed through into the adjacent apartment. The couple left and headed to Cherry's mother's home. When they stopped for fuel and Cherry got out, Bates left without him – with Cherry chasing after her, "pulling his gun and pointing it at the fleeing vehicle."

Gun in hand, Cherry approached Thomas and asked for a ride to the Wal-Mart. Thomas gave him the ride and immediately called the police after he dropped Cherry off. At 8:15 a.m., Cherry was walking through the sporting goods department, talking on the cell phone, and was overheard by a clerk saying threatening things. He purchased ammunition and began to reload the gun, but was told he could not do so inside the store. He then left and again, police were called. Finally, outside, he walked to McDonald's and was spotted by Officer Smith. The officer ordered Cherry to the ground, but instead, Cherry dropped the bag and reached for his firearm. Finally he complied and was taken into custody.

Officer Parsons arrived and searched Cherry, finding drugs and cash in his pockets. He was transported to jail and questioned regarding his actions with Bates and at the Wal-Mart. During the same time frame, Lemghaili' s body was found. Through his GPS and his cell phone, it was learned his last conversation had been with Cherry and the last route between Maudlin's home and where he was found.

[153] Beaty v. Com., 125 S.W.3d 196 (Ky. 2003); Crane v. Kentucky, 476 U.S. 683 (1986)."
[154] Gray v. *Com.*, 480 S.W.3d. 253 (Ky. 2016),
[155] Malone v. Com., 364 S.W.3d 121 (Ky. 2012)

While in jail, Cherry spoke to his mother several times, and told her that he'd killed Lemghaili. He also stated he'd been trying to kill Bates when he shot at her. His clothing was seized and DNA evidence was found, linking him to Lemghaili' s death. Dets. Wilson and Brotherton questioned him about the murder, and he stated "he had been very intoxicated on drugs and alcohol on Saturday night and claimed not to remember what had happened." He admitted to the shooting involving Bates. Between statements of remorse and claiming to have only flashes of memory of what had occurred, he was charged with the murder.

At trial, Cherry primary defense was voluntary intoxication, KRS 501.080(1) – which would have served to reduce the murder charges to Manslaughter 2nd.[156] However, he was convicted of Murder and myriad of other charges connected to the incidents. He appealed.

ISSUE: May crimes that occur in a single continuous course of conduct be joined into a single case?

HOLDING: Yes

DISCUSSION: Cherry argued it was improper to have joined all the charges into a single trial. The Court agreed that "all of the charges stemmed from Cherry's continuous course of conduct spanning only about five hours." As the trial court noted, "at no point during that five-hour period was [Cherry] doing nothing," but instead, there was a "clear, unbroken chain of events" connecting all of the crimes. "The events leading to his commission of each of the charged crimes were like falling dominos, with each poor decision inexorably leading to the next." In addition, evidence of flight to avoid arrest is admissible under Kentucky law ""to show a sense of guilt because flight is always some evidence of a sense of guilt."[157]

The court further noted that although he initially claimed to have been in a blackout, that "he seemed to have significantly recovered his memory of events by trial." His testimony at trial indicated he was awakened by the driver yelling at him, and related what he alleged happened after that, which indicated "intentional, knowing conduct." Cherry also argued it was improper for the prosecution to ask Det. Wilson whether he believed Cherry was honest with him during the interview. Generally, the Court noted, it "has long "disapprove[d] of the practice of asking a witness whether another witness [has lied]."[158] The court agreed, however, that the error, if any, was harmless, as Cherry also admitted that he'd lied. The Court also found the crime scene photo, although gruesome, was probative.

Cherry's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – DEFICIENT COUNSEL

Booker v. Com., 2014 WL 351976 (Ky. App. 2015) (HELD OVER FOR FINALITY)

FACTS: Booker was charged with Capital Murder and Burglary. He took a guilty plea, but then maintained that the plea was "unknowingly and involuntarily entered because his attorney never explained that he had "free access to the apartment he was charged with burglarizing" – he had a key and was allowed to come and go. (As such, it was improper to charge him with Burglary or use it as an aggravator for capital murder.)

ISSUE: Will a person with a key (and free access) be committing burglary if they enter?

HOLDING: No (as a general rule)

[156] Fields v. Com., 274 S.W.3d 375 (Ky. 2008)
[157] Doneghy v. Com. , 410 S.W.3d 95 (Ky. 2013). Fallis v. Com., 247 S.W. 22 (Ky. 1923).
[158] Hall v. Com., 337 S.W.3d 595 (Ky. 2011); see also Lanham v. Com., 171 S.W.3d 14 (Ky.2005)

DISCUSSION: The Court agreed that the proper standard in such cases is whether there was a "reasonable possibility" that his counsel was deficient. Since the trial court used a higher standard in making its decision, the Court vacated the plea and remanded the case.

CIVIL LITIGATION

Cohorn v. Carcamo / City of Versailles PD / Fields, 2016 WL 3574620 (Ky. App. 2016)

FACTS: On April 21, 2013, Diaz-Diaz struck a vehicle being driving by Rocky Cohorn (with his wife Wendi and son Blake as passengers) head-on in Versailles. Blake died and his parents were severely injured. Diaz-Diaz was DUI at the time. Earlier that evening, Diaz-Diaz had attended a local rodeo event in Woodford County, where alcohol was sold and imbibed without a permit. Officer Carcamo (Versailles PD) and Deputy Fields (Woodford County SD) both worked as security for the event organizer. When Diaz-Diaz became involved in a disturbance, he was ordered off the premises by Officer Carcamo.[159] Following that, the crash occurred.

The Cohorns sued the two peace officers, among others. The case was dismissed after the two peace officer defendants successfully argued that they did not owe the Cohorns any duty of care. The Cohorns appealed.

ISSUE: Is there a duty of care in allowing an intoxicated subject to leave a venue?

HOLDING: No

DISCUSSION: The Cohorns argue that the Circuit Court "misapplied the holding of City of Florence v. Chapman, in determining that Carcamo did not owe a duty of care.[160] They further argue that the facts of Chipman are distinguishable from those of the instant case because of the foreseeable harm created when Carcamo knowingly ordered an intoxicated Diaz-Diaz to leave the rodeo. In support of this latter position, the Cohorns cite our Supreme Court's recent decision in Gaither v. Justice & Public Safety Cabinet, The Court looked at each, however, and agreed that the two peace officer defendants lacked a "special relationship" with the Cohorns with the commensurate duty of care and "such a special relationship is necessary to avoid imposing 'a universal duty of care on the police to prevent any third party harm to each and every citizen with whom they have contact[,]" which would "severely reduce the ability of . . . [police officers] to engage in any discretionary decision-making on the spot.'". The plaintiff must satisfy the following two conditions in order to show the existence of a special relationship: (1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and (2) the violence or other offensive conduct must have been committed by a state actor.[161]

In Gaither, however, the Court had deviated from the usual rule, finding that ""[t]he 'special relationship' rule was developed in the context of injuries suffered by members of the general public disassociated with and far removed from negligent acts that allegedly caused their injuries." In the Gaither facts, the Court agreed that a state agency (KSP) "actually created a connection with the injured claimant, and then repeatedly fostered the continuation of that relationship." The injury, in that case, the murder of a confidential informant, was "uniquely foreseeable."

In this case, however, the Court agreed that the "Cohorns cannot establish the existence of a special relationship with a police officer even though Carcamo knowingly ordered an intoxicated Diaz-Diaz to leave the rodeo premises via the parking lot. The Cohorns were never in custody, and no state actor perpetrated the fatal collision. Moreover, though it was foreseeable that Diaz-Diaz would cause a fatal traffic collision, the circumstances do not resemble those "uniquely foreseeable" circumstances of Gaither. Carcamo had no connection with the Cohorns of any sort, much less a continuous state-created

[159] It is not clear from the record what interaction Fields had with Diaz-Diaz.
[160] 38 S.W.3d 387 (Ky. 2001),
[161] Id. at 392 (citing Fryman v. Harrison, 896 S.W.2d 908 (Ky.1995)).

relationship. Instead, the Cohorns can more appropriately be classified as "members of the general public who . . . by happenstance indirectly [fell] victim[s] to police negligence." Without a special relationship, Carcomo did not owe the Cohorns a duty of care and there was no negligence to impute to the Versailles police department."[162]

The Court affirmed the dismissal.

Fentress (and others) v. Martin Cadillac / Copple, 2015 WL 4776297 (Ky. App. 2015) (HELD OVER FOR FINALITY)

FACTS: On June 6, 2010, James Fentress died (and others injured) when Jessie "ran into their vehicles while attempting to evade police" in Hardin County. The vehicle had been stolen the previous night, when it was left unlocked and with the key in the ignition by Copple, who worked for the Martin dealership. He was allowed to drive the vehicle by the dealership, which owned it.

Fentress's estate filed suit against Jessie, the officers involved in the chase, the dealership and Copple, among others. Martin and Copple argued that Jessie's actions were the intervening and superseding cause of the crash. The Court granted summary judgement to Martin and Copple. Jessie pled guilty to stealing the vehicle. The Estate appealed.

ISSUE: Does a superseding criminal act affect a negligence case?

HOLDING: Yes

DISCUSSION: The Court looked to the language in KRS 189.430(3) – which prohibited vehicles from being left unattended with the key in the ignition. The Court looked to Bruck v. Thompson in which the Court held that the statute did not apply in a private driveway.[163] In this case, the vehicle was in an apartment parking lot. The Court agreed that any negligence in leaving the key in the car was superseded by the criminal act.[164]

The Court upheld the dismissal of the action.

EMPLOYMENT

Paul v. City of Lebanon Junction, 2015 WL 4385722 2015 WL 4385722 Ky. App. 2015 (HELD OVER FOR FINALITY)

FACTS: On July 30, 2008, Paul was orally terminated (apparently at roadside) as Lebanon Junction's police chief, by Mayor Sweatt. He requested a hearing within 24 hours. The next day, he was told that his performance had been unsatisfactory but that he could request a review. No review was requested and no hearing was held, within the 60 days permitted by KRS 15.520. He filed a lawsuit in October,. The trial court ruled that the statute did not apply because his termination was not triggered by a citizen complaint and denied the claim. It also found that KRS 95.765 did not apply, because the city did not have a civil service system. That left only KRS 83A.080, which has removal at will provisions, and the Court noted that no hearing was required under that statute.

Paul appealed the ruling of summary judgement.

ISSUE: Must an officer be provided a hearing upon termination?

[162] See Cohen v.Alliant Enterprises, Inc., 60 S.W.3d 536 (Ky. 2001) (explaining that the test as to the liability of the master is whether the servant was negligent)."
[163] 131 S.W.3d. 764 (Ky. App. 2004).
[164] Island Creek Coal Co., v. Bays, 549 S.W.2d 523 (Ky. App. 1977). The Court differentiated this case from Pile v. City of Brandenburg, 215 S.W.3d 36 (Ky. 2007) in which a police officer left an intoxicated subject in the cruiser with the keys, and the subject stole the car and caused the death of another individual.

HOLDING: Yes

DISCUSSION: The Court looked to its recent decision in Pearce v. University of Louisville – it had held the Paul case in abeyance in anticipation of the above.[165] The Court agreed that in Pearce, administrative due process rights for police officers apply to both internally and externally generated complaints Neither KRS 15.520 or 95.975 "puts the onus on an officer to request a hearing," and in fact, the most recent iteration of KRS 15.520 actually requires a hearing, unless the officer waives it.

Finding that Paul was entitled to a hearing, and did not receive it, and as such, he was entitled to be reinstated and provided back pay.

NOTE: This case may be affected by subsequent changes in KRS 15.520.

COURTS

Walters v. Com., 2016 WL 3176788 (Ky. App. 2016)

FACTS: Walters argued that during his trial in Warren County, the bailiff in charge of the jury was not given the requisite oath to "keep the jury together and insulate them from communications regarding the case."[166]

ISSUE: Should the bailiff be given an oath in regards to the jury?

HOLDING: Yes

DISCUSSION: However, in Cole v. Com., the Court had ruled it was not reversible error if the trial court neglected to do so, so long as the court officer in fact actually performed their duties.[167] Although it was argued that the jury was allowed to keep their phones, there was no indicated that they used the phones "during deliberations or otherwise participated in any inappropriate communication."

The Court affirmed his conviction.

MISCELLANEOUS – SERVICE OF PROCESS

Martin v. Popa, 2016 WL 1558518 (Ky. App. 2016)

FACTS: Daniel Popa is married to Martin, but was previously married to Lucia Pop-Schenk Popa (the appellant). Lucia has a DVO against Daniel that restricts contact between them. In January, 2014, Lucia filed a motion to hold Daniel in contempt for violating the DVO. The two sides exchanged witness lists, both of which included Rebeca Popa (misspelled Rebecca). Martin, however, does not live in Kentucky, but was served when she was travelling through the state and ordered to appear for a deposition in the case. She did not appear, however.

Lucia filed a motion to hold her in contempt. An attorney appeared on her behalf, arguing that she was not properly served. The Court agreed with Martin and set aside the service of process. However, the Court did enter an order directing the taking of her deposition in her state of residence (Florida) but again, she did not appear. Again, Lucia moved for contempt and this time, was successful. The trial court ruled Martin was in contempt and ordered her into custody.

ISSUE: If someone passes through Kentucky, may they be lawfully served?

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[165] 448 S.W.3d 746 (Ky. 2014).

[166] RCr 9.68. When the jury is kept together in charge of officers, the officers must be sworn to keep the jurors together, and to suffer no person to speak to, or communicate with, them on any subject connected with the trial, and not to do so themselves. However, in Cole v. Com., the Court had ruled it was not reversible error if the trial court neglected to do so, so long as the court officer in fact actually performed their duties.

[167] 553 S.W.2d 468 (Ky. 1977).

HOLDING: Yes

DISCUSSION: Martin argued that the trial court did not have in personam jurisdiction over her and could not hold her in contempt. The Court looked to International Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement and Kentucky's Long Arm Statute.[168] The Court noted, however, that "being personally served with a subpoena while in Kentucky is sufficient to bring a person under the jurisdiction of a Kentucky Court."[169] The Court looked to the Kentucky Rules of Civil Procedure, 45.03(1) which discusses the subpoena service.

Further, once served, the subject is under a "continuing obligation" to be available to the trial court until the case ends.[170] She was properly served and thus, contempt was proper. She was further properly notified of the contempt motion, as evidenced by the appearance of a lawyer on her behalf.

[168] 326 U.S. 310 (1945); KRS 454.210.
[169] Halcomb v. Halcomb, 337 S.W.2d 32 (Ky. 1960).
[170] Otis v. Meade, 483 S.W.2d 161 (Ky. 1972).

SIXTH CIRCUIT

FEDERAL LAW – VULNERABLE VICTIM

U.S. v. Nash 2016 WL 2865729 (6th Cir. 2016)

FACTS: Nash (and others) was involved in unemployment fraud in several states. She was indicated on a variety of federal charges and ultimately pled guilty. She was sentenced under the vulnerable victim enhancement and she appealed the sentence.

ISSUE: Does victimizing a "vulnerable victim" subject a defendant to an additional punishment?

HOLDING: Yes

DISCUSSION: Nash argued that it was improper to apply the enhancement, which provides for a two-level enhancement when the defendant knew or should have known the victim was vulnerable – due to "age, physical or mental condition," or is 'particularly susceptible." It can apply when the victims are "predisposed to the very scam" at issue, which was the case here – poor victims who were under a great deal of debt pressure. The Court agreed the fact that she netted $360,000 proved that in fact, the audience was susceptible and upheld the enhanced penalty.

FEDERAL LAW - ENTRAPMENT

U.S. v. Wilson / Davis, 2016 WL 3455354 (6th Cir. 2016)

FACTS: Nunn is a convicted felon and also an "experienced confidential informant. In 2012, Nunn approached Agent Nether to make a deal to assist his brother in getting a deal in his own criminal case. He told the agent that his step-brother, Davis, trafficked in firearms and narcotics. As Davis's history suggested that was true, the agent encouraged Nunn to try to make a buy, and he did so, of both. The next year, Nunn told Nether he'd learned that Davis was intending an armed home invasion of another drug dealer, and again, his criminal history supported that – so they set up an undercover meeting between Davis and Nether "so Nether could present Davis with an opportunity to rob a drug dealer."

On April 23, 2013, during the meet, "Nether presented the following fictitious scenario: he was a disgruntled drug courier seeking to rob up to 10 kilograms of narcotics from a drug supply house. Nether said there would be at least two armed people inside so he needed "a crew of professionals" to rob the supply house and "didn't want any amateurs[,] just professionals, people that had done this before." Davis said he could do it and would find three accomplices." Davis and Nunn then left, and Davis suggested to Nunn that they rob Nether instead. David called Wilson, and they discussed the plan, and discussions were ongoing about alternative plans between Davis and Nunn (who was recording the conversations) for several days.

In the second meet, several days later, the home invasion was again discussed between the four men, with Wilson on the phone. After the meeting though, Davis told Nunn they should kill Nether. The next day, all four met in person, but only after Davis again detailed his plan to rob and kill Nether rather than the intended original target. On May 2, the plan was to be implemented, but instead, they were arrested by federal agents. Wilson tossed away a loaded handgun during the arrest and also had a knife.

Both Davis and Wilson were charged with federal conspiracy to murder the agent along with drug and firearms charges. Both were convicted and appealed.

ISSUE: Is simply making the opportunity for a person to commit a crime entrapment?

HOLDING: No

DISCUSSION: Both Davis and Wilson argued that they were entrapped. The Court noted that "a valid entrapment defense requires proof of two elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity."[171] "The government has the burden of proving beyond a reasonable doubt that the defendant was already willing to commit the crime." [172] "Predisposition, the principal element in the defense of entrapment, focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime."[173] Relevant factors for determining predisposition include: (1) "the character or reputation of the defendant, including any prior criminal record," (2) "whether the suggestion of the criminal activity was initially made by the Government," (3) "whether the defendant was engaged in the criminal activity for profit," (4) "whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducement or persuasion," and (5) "the nature of the inducement or persuasion supplied by the government.".

Both argued that nothing in their prior history showed they were predisposed to commit the crime. The Court agreed, however, that their combination of prior histories, between drug trafficking, home invasion robberies and domestic violence was sufficient, when combined with their plan to rob and kill Nether, was more than sufficient. (The Court was neutral on the remaining elements.) With respect to the last factor, inducement, it requires:

> … something more than merely affording an opportunity or facilities for the commission of the crime."[174] It requires "'an opportunity *plus* something else—typically, excessive pressure by the government upon the defendant or the government's taking advantage of an alternative, non-criminal type of motive.'"[175] Simply the prospect of a substantial payout was not inducement. And of course, their planned crime wasn't even the one proposed by the government.

The Court also looked at the introduction of the recordings of Nunn's statements, which were admitted as "*res gestae* because they provided background and context for defendants' statements in the recordings." Nunn was not called as a witness nor would the prosecution produce Nunn or disclose his location to the defense, although it did share his criminal history. The court agreed that "the vast majority of Nunn's statements introduced at trial were not offered to prove the truth of the matter asserted. They provided background and context for defendants' incriminating statements and gave meaning to their responses." The Court also noted that the government was not obligated to produce Nunn, when the defense already knew who he was.

The Court upheld the convictions.

SEARCH & SEIZURE – ARREST

U.S. v. Fonville, 2016 WL 3346075 (6th Cir. 2016)

FACTS: On October 17, 2013, Fonville, already the subject of a DEA investigation, was stopped for a minor traffic offense. The officers had, earlier that day, confirmed there was an active arrest warrant for an unrelated offense for Fonville. He admitted, during the stop, that the warrant existed. He was arrested and charged, and given Miranda.

Fonville consented to a vehicle search and a K-9 alerted on the vehicle. The vehicle (and Fonville) was relocated to a police precinct, where 123 grams of crack cocaine were found in the vehicle. He admitted he'd been riding around with it all day and that he intended to break it up and sell it. He was indicted for

[171] U.S. v. Khalil, 279 F.3d 358 (6th Cir. 2002).
[172] Anderson, 76 F.3d at 689 (citation omitted).
[173] Mathews v. U.S., 485 U.S. 58 (1988) (internal quotation marks and citation omitted); *see also* U.S. v. Pennell, 737 F.2d 521 (6th Cir. 1984) ("The central inquiry . . . is whether law enforcement officials implanted a criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to commit a crime to one who was already predisposed to do so.").
[174] U.S. v.Poulsen, 655 F.3d 492 (6th Cir. 2011).
[175] U.S. v. Dixon, 396 F. App'x 183 (6th Cir. 2010) (quoting U.S. v. Gendron, 18 F.3d 955 (1st Cir. 1994))

possession with intent to distribute. He moved for suppression and was denied. He was convicted and appealed.

ISSUE: Is an arrest based on a facially valid warrant permitted?

HOLDING: Yes

DISCUSSION: The Court noted that "Fonville's arrest was justified by the outstanding warrant." The warrant was valid and although there was later evidence there might have been an issue with it, it was on its face, valid. Although he argued U.S. v. Herring, the Court agreed that "Herring does not stand for a general duty to investigate the validity of warrants in police databases."[176] Given that he was legally under arrest, the length of time it took the K9 to arrive was immaterial.

After addressing other procedural issues, the Court affirmed his conviction.

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Jones, 817 F.3d 489 (6th Cir. 2016}

FACTS: A CI told Agent Kloostra (ATF) that "D" was selling cocaine out of a Flint, MI residence. Kloostra made some first-hand observations, including seeing Jones, who drove off in a car registered to that address, and then promptly sold drugs to the CI, and got a search warrant, where cocaine, guns, scale and cash were found. Jones was arrested on weapons and drug charges. The trial court upheld Jones' suppression motion, finding that the search warrant did not support probable cause and the government appealed.

ISSUE: Is basing a warrant on a corroborated tip valid?

HOLDING: Yes

DISCUSSION: The Court looked at the facts that Kloostra had, both from the CI and his own observations. The Court noted that "a mere dinner guest … typically does not drive off in the family car." The combination of facts indicated that drugs were being trafficking from the house in question. The Court acknowledged the district court's concerns, that there was little information about the CI (although Kloostra had worked with that CI for two years), The Court noted that the case was not based solely on a tip and that there was more than enough information to support the warrant.

The Court reversed the trial court's ruling and remanded the case.

U.S. v. Brown, 2016 WL 3584723 (6th Cir. 2016)

FACTS: On March 30, 2011, Agent Fitch (DEA) obtained a warrant for Brown's Detroit home. The warrant began with **"**two pages of standard recitations regarding drug crimes." The agent then addressed the investigation of another individual, Middleton, which led to traffic stops in which a third individual was arrested. Brown was arrested when found in the company of Middleton during another traffic stop, and he was linked to the drug trafficking by phones located in the vehicle, one or two of which were connected to Brown. He was booked and found to be in possession of a large amount of cash. During the warrant service for Middleton's, a large quantity of heroin was found.

The warrant also noted that when Middleton's home was searched, a drug dog alerted on a SUV registered to Brown at the curb. However, there is no indication whether drugs were found. The vehicle was, however, seized. Days after Brown was arrested, Agent Fitch got a warrant for the four phones seized from the vehicle, one of which was linked to Brown. That phone included text messages

[176] 555 U.S. 135 (2009).

suggesting drug trafficking. Agent Fitch included information concerning Brown's criminal history. The warrant was issued. (In all, three warrants were obtained.)

During the search of the house, weapons ammunition, cash and drugs were found, along with drug trafficking evidence. However, no heroin was found, nor was any evidence linking him to a heroin trafficking conspiracy. Brown was charged with trafficking and possession of the weapons, as he was a convicted felon. He moved for suppression, which was denied. He was charged with involvement in the heroin conspiracy, but acquitted of that charge. He was convicted for marijuana and the guns, however, found during the search. He appealed.

ISSUE: Must there be a nexus between a residence and drug trafficking to support a search warrant?

HOLDING: Yes

DISCUSSION: The court looked at a number of cases "in which the nexus is too vague or generalized to support a search warrant." It had concluded "that a search warrant affidavit failed to "establish the requisite nexus between the place to be searched and the evidence to be sought" where it stated no more than that the defendant resided at the address and was arrested there on a non-drug offense with a quantity of crack cocaine on his person.[177] We also found the nexus insufficient in a case where an informant actually identified the defendant's residence as the site of a drug operation.[178] The police had not established the informant's reliability, we explained, and furthermore, the affidavit did not "assert that the informant had been inside [the defendant's] apartment, that he had ever seen drugs or other evidence inside [the defendant's] apartment, or that he had seen any evidence of a crime other than the one that occurred when [the defendant] allegedly sold him drugs." "Without such an assertion," we concluded, "the affidavit fails to establish the necessary nexus between the place to be searched and the evidence sought.".[179]

In this case:

> … the search warrant affidavit contained no evidence that Brown distributed narcotics from his home, that he used it to store narcotics, or that any suspicious activity had taken place there. The affidavit did not suggest that a reliable confidential informant had purchased drugs there, that the police had ever conducted surveillance at Brown's home, or that the recorded telephone conversations linked drug trafficking to Brown's residence. The Government notes that Brown's car, which was registered to his residence, was parked outside Middleton's home and tested positively for narcotics during a canine search. Although these facts supported the search of Brown's car, they did not establish a fair probability that evidence of drug trafficking would be found at his residence. A more direct connection was required, such as surveillance indicating that Brown had used the car to transport heroin from his home to Middleton's on the day in question. The mere fact that the car was registered to Brown's home was too vague and generalized a nexus to support the search warrant.

The Court agreed that Brown being a "known drug dealer" was not enough to infer that evidence would be found in his home, requiring at least "some reliable evidence connecting the known drug dealer's ongoing criminal activity to the residence; that is, we have required facts showing that the residence had been used in drug trafficking, such as an informant who observed drug deals or drug paraphernalia in or around the residence."

The Court continued, stating that its "emphasis on the fact-intensive nature of the probable cause inquiry in known drug dealer cases accords with the Supreme Court's rejection of "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach" when

[177] U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006).
[178] See U.S. v. Higgins, 557 F.3d 381 (6th Cir. 2009).
[179] U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004).

evaluating probable cause.[180] Further, ""[t]he critical element in a reasonable search is not that the owner of property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."[181]

Although the Court agreed there were some facts suggested he was linked to the heroin drug conspiracy, there was not enough to support a warrant that drug evidence would be found at his home.

The Court also noted that the police waited 22 days following the initial arrest to get a warrant for brown's home, nor was there any indication that any investigation had been done to support the warrant beyond what they had on March 9, the date of his arrest. As such, the Court agreed there was insufficient evidence to even support a good faith argument.

Brown's conviction for what was found at the house was vacated and the case remanded.

U.S. v. Church, 823 F.3d 351 (6th Cir. 2016)

FACTS: In August, 2012, Dets. Moseley and Bowling (Nashville PD) went to Church's home to arrest him on a probation violation warrant. Church arrived within minutes and he was taken into custody. Church, who had food he'd just picked up, asked if he could go inside and eat, and call his girlfriend. They entered together and the detectives smelled marijuana; Church admitted he'd recently smoked it. He took Bowling upstairs and showed them a blunt. His girlfriend showed up and admitted that Church regularly smoked it at the house.

Mosely went to get a search warrant, detailing the visit and the conversations. However, they mentioned a crime (distribution) that was not a factor given the items specifically sought. He stated that the house (by address) was in possession of certain evidence, including controlled substances. Upon the subsequent search, they found marijuana and 8 hydromorphone (Dilaudid), as well as a safe. Church refused to provide the code to the latter, so they pried it open, finding 800 Dilaudid pills, a gun and ammunition.

Church was charged with intent to distribute the drugs and to being a felon in possession. He sought suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May a search warrant authorize breaking into a safe, thereby destroying it?

HOLDING: Yes

DISCUSSION: Church argued that at best, they only had probable cause to search for evidence of simple possession.

The Court noted:

> The Fourth Amendment guarantees that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The amendment's text makes clear that "[s]earch warrants are not directed at persons; they authorize the search of 'places' and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized."[182] It follows that the "critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."

[180] Florida v. Harris, 133 S. Ct. 1050 (2013)."
[181] Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).
[182] Id.

As such, to satisfy probable cause, **"**an affidavit must show a likelihood of two things: first, that the items sought are "seizable by virtue of being connected with criminal activity"; and second, "that the items will be found in the place to be searched." The nexus between "criminal activity" and the item to be seized is "automatic[]" when the object of the search is "contraband."[183] Marijuana is contraband because its possession and production is prohibited under federal law and the criminal laws of most states, including Tennessee's.[184] A police request to search for illegal drugs therefore needs to satisfy only the second showing for a valid warrant: "a fair probability" that the drugs "will be found in a particular place."[185] That standard is met where, for example, the affiant swears that he has seen marijuana seeds and smelled marijuana smoke inside the house to be searched.[186]

Mosely had information that gave an "outright certainty" that there was marijuana in the house, they got a warrant to search for the drugs and searched only in lawful places. Despite the mention of distribution, "drugs are contraband, and the police have a right to seize them, pursuant to a search warrant, wherever they are likely to be present."

Further, the information was fresh, and not stale, given the information they had at the time.

With respect to using a pry bar to open the safe, destroying it, the Court agreed the officer had the right to get into the safe. The Court noted that ""[A] warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found."[187] And "officers executing search warrants on occasion must damage property in order to perform their duty."[188] For example, if a home's occupant refuses to admit an officer after he announces his authority and purpose, the officer may lawfully break open the door.[189]

> Here, the police did not break open the safe capriciously: they had probable cause to believe there might be drugs inside; Church refused to provide the safe's combination; and thus the police had no choice but to open it by force. The district court was right to hold that the police acted reasonably when they did so. The district court's judgment is affirmed.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

Spann v. Carter, 2016 WL 2865727 (6th Cir. 2016)

FACTS: In 2012, Spann pled guilty to a federal hunting misdemeanor offense. He was put on probation and ordered not to hunt in the U.S. for six months. However, within the month, a photo of him dressed in hunting gear, with a dead turkey, surfaced, with a clear indication that he'd been hunting with his organization (Spook Nation). Tennessee Wildlife Resources Agency and the U.S. Fish and Wildlife "had anticipated Spann's premature return to hunting." They had installed several cameras on his property that recorded Spann's hunting related activities. His probation was revoked and he was charged with state crimes. A warrant was executed on his home and cell phone.

Spann filed suit under 42 U.S.C. §1983, concerning the cameras. The trial court ruled against him and he appealed.

ISSUE: Are cameras set up in open fields lawful?

HOLDING: Yes

DISCUSSION: Spann argued that the law enforcement officers set up cameras on his private property, but the Court noted that he "has failed to allege how the "private farms" he uses for hunting are any different from other open fields that fall outside the Fourth Amendment's protection. Turkey hunts

[183] Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967); see also Black's Law Dictionary 365 (9th ed. 2009) (defining "contraband" as "[g]oods that are unlawful to import, export, produce, or possess").
[184] See 21 U.S.C. §§ 841, 844; Tenn. Code Ann. §§ 39-17-417, 39-17-418.
[185] See Illinois v. Gates, 462 U.S. 213 (1983).
[186] See U.S. v. Brooks, 594 F.3d 488 (6th Cir. 2010); see also U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004).
[187] U.S. v. Ross, 456 U.S. 798 (1982).
[188] Dalia v. U.S., 441 U.S. 238 (1979).
[189] See 18 U.S.C. § 3109; U.S. v. Ciammitti, 720 F.2d 927 (6th Cir. 1983)."

typically do not take place within a home's curtilage.[190] That the officers here used cameras does not transform their surveillance into a search requiring a warrant.[191]." The Court upheld the information learned from the cameras.

Spann also argued that the warrant used to search his cell phone was stale. (They had earlier obtained a warrant and not used it, but used the same information to get a new warrant six months later.) The Court disagreed, noting that the current warrant, to search the home, essentially encompassed the cell phone anyway, and he did not allege any facts that would have changed in the six months in question. The Court dismissed that claim. Finally, the Court also agreed that the taking of certain items as evidence of a crime, that was in the possession of other people at the time, without compensation, was lawful as the Fifth Amendment's Takings Clause "does not prohibit the uncompensated seizure of evidence in a criminal investigation, or the uncompensated seizure and forfeiture of criminal contraband.[192]

Spann's case was dismissed.

SEARCH & SEIZURE – SCA

U.S. v. Carpenter / Sanders, 819 F.3d 880 (6th Cir. 2016)

FACTS: In April, 2011, four men were arrested on suspicion of involvement in a series of armed business robberies in and around Detroit. One confessed, describing a "shifting ensemble" of 15 men who committed the crimes. He provided his cellphone number to the FBI, which then "reviewed his call records to identify still more numbers that he had called around the time of the robberies."

Subsequently, the FBI applied for court orders to "to obtain "transactional records" from various wireless carriers for 16 different phone numbers." Among other information requested, it sought "[a]ll subscriber information, toll records and call detail records including listed and unlisted numbers dialed or otherwise transmitted to and from [the] target telephones from December 1, 2010 to present[,]" as well as "cell site information for the target telephones at call origination and at call termination for incoming and outgoing calls[.]" The affidavit described involvement in violations of the Hobbs Act.[193] The court orders were pursued through the Stored Communications Act, in which the disclosure of such records was allowed when ""specific and articulable facts show[] that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."[194]

Carpenter and Sanders were identified and charged. Both moved to suppress the cell-site evidence under the Fourth Amendment, arguing that "the records could be seized only with a warrant supported by probable cause." That was denied. During the trial, Agent Hess offered expert testimony regarding the cell-site data, explaining how the technology work, and specifically how, in urban areas, the towers each covers a relatively small area and that certain information is logged about each call – "including the date, time, and length of each call; the phone numbers engaged on the call; and the cell sites where the call began and ended." With that data, they were able to show that Carpenter and Sanders (or, at least, their phones) were in close proximity to the robbery locations at the time each occurred, based upon calls made during the relevant time frame.

Both were convicted and appealed.

ISSUE: Is the use of cell phone tracking data, via the cell phone company, a search?

HOLDING: No

[190] See U.S. v. Carloss, --- F.3d ---, 2016 WL 929663, at *7 (10th Cir. Mar. 11, 2016).
[191] See U.S. v. Vankesteren, 553 F.3d 286 (4th Cir. 2009)
[192] See Acadia Tech., Inc. v. U.S., 458 F.3d 1327 (Fed. Cir. 2006)."
[193] 18 U.S.C. §1951.
[194] 18 U.S.C. § 2703(d).

DISCUSSION: The Court noted that that data in question "took the form of business records created and maintained by the defendants' wireless carriers: when the defendants made or received calls with their cellphones, the phones sent a signal to the nearest cell-tower for the duration of the call; the providers then made records, for billing and other business purposes, showing which towers each defendant's phone had signaled during each call." The government subsequently requested that data through the SCA, "which required the government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation."

The Court agreed that the Fourth Amendment applies when an individual has a reasonable expectation of privacy, and that the government, when trespassing into those areas, commits a search. The Court has long recognized a degree of privacy interest that is inherent in communications, but had differentiated between "between the content of a communication and the information necessary to convey it." As far back as Ex Parte Jackson, the Court recognized that the content of a package going through the mail is private, but at the "outward form and weight" as well as the recipient's name and arrest, was not protected.[195] As technology changed, the Court found itself addressing telephone calls, and again, the court differentiated between the activity of listening into and recording the words, and the pen register, which collected the incoming and outgoing numbers.

> Today, the same distinction applies to internet communications. The Fourth Amendment protects the content of the modern-day letter, the email.[196] But courts have not (yet, at least) extended those protections to the internet analogue to envelope markings, namely the metadata used to route internet communications, like sender and recipient addresses on an email, or IP addresses.[197]

The business records at issue in this case "fall on the unprotected side of this line." They were records collected by the provider to perform the internal tasks necessary to the business itself. Just like the understanding that the phone company knows the number of the person you are calling, the cell phone company knows the location from where your call originated and was received. It connects to the cell phone tower to establish communication.

Further:

> Whether a defendant had a legitimate expectation of privacy in certain information depends in part on what the government did to get it. A phone conversation is private when overheard by means of a wiretap; but that same conversation is unprotected if an agent is forced to overhear it while seated on a Delta flight. Similarly, information that is not particularly sensitive—say, the color of a suspect's vehicle—might be protected if government agents broke into the suspect's garage to get it. Yet information that is highly sensitive—say, all of a suspect's credit-charges over a three-month period—is not protected if the government gets that information through business records obtained per a subpoena.[198]

When information is shared with a third party, the Court agreed that diminishes any expectation of privacy in said records.

> Unlike Jones, this is not a GPS-tracking case. The data in this case "could do no better than locate the defendants' cellphones within a 120- (or sometimes 60-) degree radial wedge extending between one-half mile and two miles in length," considerably less accurate than a GPS. Although certain devices (femtocells) can location a phone much more precisely, a femtocell was not in use in this situation.

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[195] 96 U.S. 727, 733 (1878)
[196] See U.S. v. Warshak, 631 F.3d 266 (6th Cir. 2010).
[197] See, e.g., U.S. v. Christie, 624 F.3d 558 (3d Cir. 2010); U.S. v. Perrine, 518 F.3d 1196 (10th Cir. 2008); U.S. v. Forrester, 512 F.3d 500 (9th Cir. 2007).
[198] See U.S. v. Phibbs, 999 F.2d 1053 (6th Cir. 1993).

IN this case, the Stored Communications Act, "stakes out a middle ground between full Fourth Amendment protection and no protection at all, requiring that the government show "reasonable grounds" but not "probable cause" to obtain the cell-site data at issue here."[199]

The Court acknowledged that "sometimes new technologies—say, the latest iterations of smartphones or social media—evolve at rates more common to superbugs than to large mammals." In such cases, ""[d]ramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes."[200] In such cases, the Court agreed, Congress is better equipped to answer the questions that much arise than the courts can do so. Congress, in this case, addressed the issue with the enactment of the SCA.
Sanders argued, as well, that the government's application for the data did not show that the records were "relevant and material to an ongoing criminal investigation. The Court noted, however, that suppression was not an available remedy for a violation of the SCA.

The Court held that the "government's collection of business records containing cell-site data was not a search under the Fourth Amendment" and affirmed the convictions.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Coker, 2016 WL 2755308 (6th Cir. 2016)

FACTS: Between 2:44 and .47 a.m., Officer McCullough (Rockford, TN) watched a car weave across the centerline several times, including when the driver made a turn. McCullough activated his lights to make a stop and the driver finally pulled over. Coker was found to be the driver. The officer obtained some information and returned to his cruiser to write a ticket. The officer "observed Coker intensely staring at him from his car, which he considered unusual behavior based on the hundreds of similar stops he had performed in his career." McCullough also became concerned with Coker's movements in the car, including his "leaning forward" and "reaching into the backseat." He returned to the car and asked him why he was moving around so much, and Coker stated he was nervous and concerned about points. He was told to stop moving around and the officer returned to his car. He told his ride-along that he was concerned about Coker being so nervous. When dispatch told him that Coker was clear, he decided he should extend the stop a bit and returned to ask Coker questions about drugs. He ultimately decided, based upon Coker's behavior, to call for a drug dog.

Concerned, the officer had Coker get out so he could do a frisk and found an empty holster. He then placed Coker in handcuffs. While waiting for the dog, Cocker completed the traffic ticket and within 10 minutes, the dog arrived. He alerted and during the subsequent search, a gun was found.

ISSUE: May a traffic stop be extended based on reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court analyzed the situation at each point. It noted that the observed traffic offenses justified the initial stop. The Court found the next step to be a closer call, because he decided to extend the stop after finishing all stop-related tasks. For that, he required only reasonable suspicion, and the Court agreed that is not a high bar.[201]

> Three features of this encounter taken together gave McCullough reasonable suspicion to extend the stop. *First* (and most important) were Coker's suspicious movements—"leaning forward," "reaching into the backseat," and "digging around" in the car, after being told to stop moving.. "[I]n the normal traffic stop," McCullough testified, "it [is not] common for people to keep moving around and digging around in their vehicles"—"especially after being asked not to." All of this

[199] See 18 U.S.C. § 2703(d)."
[200] U.S. v. Jones, 132 S.Ct 945 (2012).
[201] N*avarette v. California*, 134 S. Ct. 1683, 1687 (2014).

> movement meant that "[Coker] could have been looking for a weapon" or "hiding a weapon. [Or] [h]e could have been hiding drugs.". That is why this court and others have concluded that these kinds of movements in a car (in combination with other factors) may provide an officer with reasonable suspicion of ongoing criminal activity.[202] Of importance here, Coker's movements were more suspicious than the movements in many of these cases because Coker *continued* to move even after being told not to do so.[203] *Second* was Coker's nervousness. Even the most routine encounters with the police can be nerve-racking, we understand. But acting *more nervous* than the average person in a traffic stop, as Coker did, legitimately may increase an experienced officer's suspicions.[204] And it did here. *Third* was Coker's travel time—around 2:45 AM. While this factor does not by itself establish reasonable suspicion, it matters in "the reasonable suspicion calculus."[205] Conduct relatively benign in the light of day may pique one's suspicions in the dark of a late night, particularly when there is no other explanation for the late-night driving (*e.g.*, working as a truck driver).[206]

In such cases, the Court agreed, it was to "treat the whole as greater than (or at least equal to) the sum of its parts."[207] Although the dash cam does not clearly show the movement indicated by the officer (and apparently the ride-along) the Court agreed that the trial court agreed with the officer. That gave the officer reasonable suspicion to extend the stop.

> The next step involved the frisk, which required "a special kind of reasonable suspicion: reasonable suspicion not that Coker was engaged in *generic* criminal activity (which, as explained, he had) but reasonable suspicion *specifically* that Coker was "armed and dangerous."[208]
>
> He had that too. Above all, Coker would (still) not stop digging around despite McCullough's repeated admonitions to stop. Coker could have grabbed his gun during any of this digging.[209] Coker's intense staring, nervousness, and travel time didn't help his cause either.[210]

The remainder of the stop, uncontested by Coker, was "legally anticlimactic." "Coker does not make any argument about the duration of the stop—about thirty-nine minutes from the initial stop to the drug-dog alert. Nor could he. We have approved a nearly identical timeline in a traffic stop involving reasonable suspicion and a drug dog.[211] All points considered, the seizure—from the initial traffic stop to its extension to the pat-down to the ultimate search of the car—was constitutional. The district court thus correctly denied the motion to suppress the evidence. For these reasons, we affirm"

SEARCH & SEIZURE – CARROLL

U.S. v. Avant / Selma, 2016 WL 3057787 (6th Cir. 2016)

FACTS: On March 18, 2014, law enforcement executed a search warrant at a Michigan home. Right before they arrived, a vehicle pulled into the driveway and Selma, the passenger, got out of the car and went inside. When the officers arrived, Avant, the driver, got out and put his hands up. He was handcuffed and questioned away from the car. During this time, arguably, Sgt. White testified he had smelled marijuana from the vehicle, justifying the search. Selma fled, but was quickly apprehended. A

[202] E.g., U.S. v. Carr, 674 F.3d 570 (6th Cir. 2012) ("bending toward the middle console"); U.S. v. Campbell, 549 F.3d 364 6th Cir. 2008) ("slouch[ing] down . . . with his hands out of sight"); U.S. v. Graham, 483 F.3d 431 (6th Cir. 2007) ("[a] dip with his right shoulder toward the floor"); U.S. v. Bailey, 302 F.3d 652 (6th Cir. 2002) ("reaching"); see also, e.g., U.S. v. DeJear, 552 F.3d 1196 (10th Cir. 2009) ("stuffing movements toward the seat"); U.S. v. Bell, 480 F.3d 860 (8th Cir. 2007) ("reach[ing] back").
[203] See U.S. v. Mays, 643 F.3d 537 (6th Cir. 2011); see also U.S. v. Holmes, 385 F.3d 786 (D.C. Cir. 2004) (Roberts, J.).
[204] See, e.g., U.S. v. Sokolow, 490 U.S. 1, 3 (1989); U.S. v. Winters, 782 F.3d 289 (6th Cir. 2015).
[205] U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006); see Wardlow, 528 U.S. at 124.
[206] Cf.Ornelas, 517 U.S. at 699–700.
[207] U.S. v. Arvizu, 534 U.S. 266 (2002)
[208] See Arizona v. Johnson, 555 U.S. 323 (2009).
[209] See U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000); U.S. v. Tillman, 543 F. App'x 557 (6th Cir. 2013).
[210] See U.S. v. Oliver, 550 F.3d 734 (8th Cir. 2008); cf. U.S. v. McMullin, 739 F.3d 943 (6th Cir. 2014)."
[211] U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005).

semi-auto rifle, marijuana and heroin were found in the car. Both men were charged with possession of the firearm, as both were convicted felon. Both moved to suppress and were denied. Both took conditional guilty pleas and appealed.

ISSUE: Does the odor of marijuana alone justify a search of a vehicle?

HOLDING: Yes

DISCUSSION: The Court agreed that the detection of marijuana odor in a vehicle "can by itself establish probable cause for a search."[212] Both officers testified they that smelled burned marijuana from the vehicle. Avant's wife, who owned the car, testified that she didn't smell it, but did not know what had happened in the car that particular day. Although no marijuana was found in the car, the Court found the officers to be credible.

Further, the plain-view doctrine "provided an independent basis to support the warrantless search of the Buick."[213] The court agreed there was no legitimate expectation of privacy in the visible part of the interior of the vehicle.[214]

The court upheld the denial of the motion to suppress.

INTERROGATION

Grant v. McKee (Warden), 2016 WL 2342368 (6th Cir. 2016)

FACTS: Grant "strangled his wife to death, dismembered her body, and hid parts of the body throughout a nearby park." He then reported her missing in Macomb County, MI, and the search for her went on for weeks.

During that time, Grant hired Griem as his attorney, who told the Sheriff's Office that all communication with his client must go through him. Grant's wife's torso was found during a search of the home, and Grant fled the jurisdiction. He was found two days later, in another city, but Griem was not notified. Grant was taken for medical treatment and Griem "publicly withdrew" as Grant's attorney. However, Grant did not know that and asked for Griem – and he was told by law enforcement that Griem had ended their legal relationship. They offered to help him find another attorney, but he declined.

Grant asked for Sgt. Kozlowski, the lead investigator, who also told him that Griem had resigned and that he could get another lawyer. Grant, instead, asked to make a statement and Kozlowski went to the hospital, gave him Miranda, and Grant wrote out a confession.

Grant went to trial on a murder charge, as he argued that the killing was not premeditated. He moved to suppress his confession, arguing that the waiver was invalid because they did not contact Griem, as they'd agreed to do, initially. The Court denied the motion and Grant was convicted of Murder 2nd. His conviction was upheld through the state court, and his appeal was denied by the federal District Court. He further appealed.

ISSUE: May people waive their right to counsel, when their prior attorney has removed themselves from the case, and give a valid statement?

HOLDING: Yes

[212] U.S. v. Elkins, 300 F.3d 638 (6th Cir. 2002); U.S. v. Garza, 10 F.3d 1241 (6th Cir. 1993); Arizona v. Gant, 556 U.S. 332 (2009).
[213] Minnesota v. Dickerson, 508 U.S. 366 (1993).
[214] U.S. v. Galaviz, 645 F.3d 347 (6th Cir. 2011); U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008). Apparently the visible rifle constituted a crime under Michigan law.

DISCUSSION: The Court agreed there was, in fact, no precedent actually on point, although Grant argued Brewer v. Williams.[215] In Brewer, the defendant had attorneys in both the state where he was captured and the state where he was being returned, and officers agreed not to question him en route. However, they did talk about the crime in his presence and he eventually revealed the location of his victim. In this case, the Court noted, Grant had waived his right to counsel and made a voluntary statement and was under no compulsion.[216]

The Court upheld the conviction.

42 U.S.C. §1983 – ARREST

Graves v. Mahoning County, 821 F.3d 772 (6th Cir. 2016)

FACTS: Graves and 8 other "exotic dancers" were arrested multiple times in Ohio, on charges ranging from "prostitution to drug distribution to assault to witness intimidation." The women sued, arguing false arrest, against the county and various officers. However, they did not argue that the arrests were without probable cause and the trial court dismissed. Graves appealed.

ISSUE: Must arrest warrants be supported by more than bare-bones allegations?

HOLDING: Yes

DISCUSSION: The Court noted that the sole evidence in the warrants issued in most of these cases were conclusory statements from officers to clerks, who then issued the allegedly defective "rubber-stamped" warrants. The Court agreed that the warrants "appear to have been issued without any independent probable cause determination." The Court noted, however, to establish a Fourth Amendment case, the violation must show that the seizure (the arrest) was also unreasonable. An arrest is valid when an officer has probable cause to believe a crime has been committed.[217] In this case, the women only belatedly, and too late, argued that the arrests were actually without probable cause.

The Court noted that although the Fourth Amendment sets a floor, the states have established different laws that require more. For example, in this case, most of the arrests were for misdemeanors, and these were crimes that the officers did not observe, and a prohibition on arrest was consistent with the usual common law process.

Finding however, that this was not the day, or the issue, in which to address the issue, the Court affirmed the dismissal of the case.

42 U.S.C. 1983 – MALICIOUS PROSECUTION

Hoschar (David / Emily) v. Layne, 2016 WL 2641125 (6th Cir. 2016)

FACTS: The Hoschars lived across the street from their church, in South Pittsburg, TN. They set up a wireless router for the Internet for use in both buildings, but it was left open, without a password. "On April 5 and 6, 2010, Layne, a Winchester police detective and Internet Crimes Against Children (ICAC) task-force officer, discovered that still images containing child pornography were being downloaded from an IP address in South Pittsburg. Layne obtained the IP address and subpoenaed records from the internet-service provider, which showed that the IP address belonged to Emily at the Hoschar home." Officers obtained a search warrant and seized computers owned by the Hoschars. It was determined that neither contained child pornography.

The case was presented to the grand jury, which returned an indictment against David Hoschar. He resigned as pastor. Eighteen months later, the case was dismissed without prejudice. The Hoschars

[215] 430 U.S. 387 (1977).
[216] Edwards v. Arizona, 451 U.S. 477 (1981).
[217] Devenpeck v. Alford, 543 U.S. 146 (2004).

filed suit against all involved parties under malicious prosecution under 42 U.S.C. §1983. The trial court ruled against the Hoschars and they appealed.

ISSUE: Are officers testifying before the grand jury given immunity?

HOLDING: Yes

DISCUSSION: To be successful, the Hoschars were required to show that "1) a criminal prosecution was initiated against David Hoschar and Layne and Wilson made, influenced, or participated in the decision to prosecute; 2) there was a lack of probable cause for the criminal prosecution; 3) as a consequence of a legal proceeding, David Hoschar suffered a deprivation of liberty; and 4) the criminal proceeding was resolved in Hoschar's favor.[218] When only a grand jury proceeding is involved, however, "it is governed by Rehberg v. Paulk,[219] which "announced the bright line rule that a grand jury witness, including a law enforcement officer, 'has absolute immunity from any §1983 claim based on the witness' testimony,' even if that testimony is perjurious."[220]

The Court summarized the facts as follows:

> Layne and Wilson knew, but did not explain to the grand jury, that someone in the vicinity of the Hoschar home could have downloaded the child pornography because the Hoschars' router was not password protected. Additionally, Layne and Wilson told the grand jury that a second laptop was not found during the search of the Hoschar home without clarifying that the Hoschars' adult daughter, who lived elsewhere, had taken that laptop with her when she married in 2009, and that Emily Hoschar had so informed Wilson when she called him several days after Defendants searched the Hoschar home. Further, Layne knew or should have known that the TBI report ruled out that either computer found at the Hoschar home had been "scrubbed" of child pornography because the report stated that the only peer-to-peer software found on either computer, Limewire, had been uninstalled in 2009.

Although the Court found it was unfortunate that the officers had not presented a more balanced picture to the grand jury, it was bound by Rehberg, which provided immunity to the witness officers, who do not make the charging decision. The Court looked to "Vaughan v. City of Shaker Heights, the plaintiff's § 1983 malicious-prosecution claim was premised on a defendant police officer's failure to disclose exculpatory evidence in testimony before a grand jury."[221] This Court held that the defendant officer's motion to dismiss should have been granted because "Rehberg indisputably allows officers the defense of absolute immunity against any § 1983 claim premised upon grand jury testimony."

The Court upheld the dismissal.

Buchanan v. Metz / Motley, 2016 WL 2731620 (6th Cir. 2016)

FACTS: Buchanan filed suit against Metz, a Michigan Assistant General Counsel and Motley, a special agent with the same office, for malicious prosecution and false arrest under 42 U.S.C. §1983. Metz claimed and was granted absolute immunity, but Buchanan was allowed to amend his complaint to claim that Metz committed actions "outside his prosecutorial function" – for which he would have immunity. Ultimately, however, the trial court gave both immunity (qualified for Motley and absolute for Metz) and Buchanan appealed.

ISSUE: Is an officer provided qualified immunity in malicious prosecution if they don't make the charging decision?

HOLDING: Yes

[218] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010).
[219] 132 S. Ct. 1497 (2012),
[220] Coggins v. Buonora, 776 F.3d 108 (2d Cir. 2015) (quoting Rehberg, 135 S. Ct. at 1506).
[221] 514 F. App'x 611 (6th Cir. 2013),

DISCUSSION: First, the Court looked to whether **"**Motley's conduct (1) violated a statutory or constitutional right, which (2) is clearly established such that a reasonable officer would have known that the officer's conduct violated that right.[222] Qualified immunity is ordinarily a question of law for the court.[223]

Further:

> Although the legal standards for claims of false arrest and malicious prosecution under the Fourth Amendment are different, both claims turn on the existence of probable cause. To prevail on a false arrest claim brought under 42 U.S.C. § 1983, "a plaintiff [must] prove that the arresting officer lacked probable cause to arrest the plaintiff."[224] In other words, "probable cause provides a complete defense to a claim of false arrest."[225] When the arrest at issue is made pursuant to a warrant, "a plaintiff must prove (1) that the officer applying for the warrant, either knowingly and deliberately or with reckless disregard for the truth, made false statements or omissions that created a falsehood and (2) that such statements or omissions were material to the finding of probable cause." If an affidavit contains a false statement or material omission, a court should set aside any false statement, or include any omission, in order to determine whether probable cause nonetheless exists, and an alleged misstatement or exaggeration of facts is insufficient to make a claim if other facts support the State's probable cause determination.[226]
>
> To prevail on a malicious prosecution claim brought under 42 U.S.C. §1983 and premised on a violation of the Fourth Amendment (assuming that such claims are cognizable, a plaintiff is required to prove four things: (1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was a lack of probable cause for the prosecution; (3) as a consequence of the prosecution, the plaintiff suffered a deprivation of liberty, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor.[227] The definition of probable cause is "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion." The key inquiry here is whether a reasonable officer in Motley's position "would have known that his affidavit [in support of the arrest warrant] failed to establish probable cause and that he should not have applied for the warrant."[228]

Looking at the facts, the Court agreed that probable cause for the underlying crime was adequately shown and upheld the dismissal on that claim.

> Buchanan also argued that Motley "deliberately ignor[ed] exculpatory evidence."

The Court agreed that:

> A determination of probable cause "is based on the 'totality of the circumstances,' and must take account of 'both the inculpatory *and* exculpatory evidence.'"[229] Here, after examining the totality of the evidence, both harmful and helpful to Buchanan, as described above, we found that it was not clearly established that no reasonable officer would have concluded that a crime had been committed. Although Buchanan overreaches in his description of the allegedly exculpatory evidence, there was certainly information favorable to Buchanan, which raises questions as to the strength of the case against him. However, even considering this evidence in the light most favorable to Buchanan, we cannot say that it is clearly established that no reasonable officer

[222] Harvey v. Carr, 616 F. App'x 826 (6th Cir. 2015) (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)); Martin v. City of Broadview Heights, 712 F.3d 951 (6th Cir. 2013).
[223] Hunter v. Bryant, 502 U.S. 224 (1991); see also Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003).
[224] Voyticky v. Village of Timberlake, 412 F.3d 669 (6th Cir. 2005).
[225] Halasah, 574 F. App'x at 629.
[226] Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989); Burleigh v. City of Detroit, 80 F. App'x 454 (6th Cir. 2003).
[227] *See* Manuel v. City of Joliet, 136 S. Ct. 890 (2016)), Halasah, 574 F. App'x at 631.
[228] Legenzoff v. Steckel, 564 F. App'x 136 (6th Cir. 2014);[228]
[229] Wesley v. Campbell, 779 F.3d 421 (6th Cir. 2015) (quoting Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000)).

would believe that a crime was being committed. Thus, we need not address the prong of whether there was a violation of Buchanan's constitutional rights.

The Court affirmed the dismissals.

Sinclair v. Lauderdale County, TN, 2016 WL 3402594 (6th Cir. 2016)

FACTS: In June, 2014, Stephen Sinclair agreed to spend six months in drug rehab in lieu of incarceration for criminal offenses. He was placed at the Rose of Sharon program. As part of the order, he agreed that should he be furloughed from the program (such as for weekends), his mother, Cheryl, would serve as it only means of transportation. If he left the program, he was to report immediately to the Lauderdale County jail. A month into the program, his mother contacted the facility to request an overnight leave, and the program director agreed as it fit within the parameters of the order. However, he did not return as required, and spend the night with his girlfriend, who drove him back to the program the next day. When he was refused entry, he fled and went into hiding. The program notified his probation officer, mistakenly stating that his mother brought him back. A warrant was issued. Following review, Cheryl Sinclair was named as an accessory to escape after the fact, and was so charged by the Sheriff, at the direction of the district attorney. She was promptly arrested, but dismissed at her first court appearance, after spending 37 days in jail.

Cheryl Sinclair filed suit against the County and the sheriff, arguing they lacked probable cause for her arrest, under 42 U.S.C. §1983. The trial court granted summary judgement to the county defendants and Sinclair appealed.

ISSUE: Does probable cause justify an arrest?

HOLDING: Yes

DISCUSSION: The Court began:

> "To state a claim under 42 U.S.C. §1983, a plaintiff must set forth facts that, when construed favorably, establish (1) the deprivation of a right secured by the Constitution or laws of the U.S. (2) caused by a person acting under the color of state law."[230]

As there was no question as to the first, the Court looked at the second, first addressing the false arrest claim. Under Voyticky v. Vill. of Timberlake, Ohio, a claim requires that the arresting officer lack probable cause for the arrest.[231] For malicious prosecution, there must be "no probable cause to prosecute."[232] As such, "both of Ms. Sinclair's claims hinge on whether she can establish that defendants lacked probable cause to sustain her arrest and prosecution."[233]

Probable cause "exists where the "'facts and circumstances within the officer's knowledge' [are] 'sufficient to warrant a prudent person . . . in believing . . . that the suspect has committed, is committing or is about to commit an offense.'"[234] "Probable cause requires only the probability of criminal activity [and] not some type of 'prima facie' showing."[235] The Court most focus on "all facts and circumstances *within an officer's knowledge at the time of an arrest*."[236] In addition, "Officers are "under no obligation to give any credence to a suspect's story or alibi nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause."[237]

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[230] Burley v. Gagacki, 729 F.3d 610 (6th Cir. 2013) (quoting Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006)).
[231] 412 F.3d 669, 677 (6th Cir. 2005),
[232] Stricker v. Twp. of Cambridge, 710 F.3d 350 (6th Cir. 2013).
[233] See Young v. Owens, 577 F. App'x 410 (6th Cir. 2014).
[234] Stricker, 710 F.3d at 362 (quoting Crockett v. Cumberland Coll., 316 F.3d 571 (6th Cir. 2003)).
[235] Id.
[236] Green v. Throckmorton, 681 F.3d 853 (6th Cir. 2012) (quoting Crockett, 316 F.3d at 580)."
[237] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999) (quoting Criss v. City of Kent, 867 F.3d 259 (6th Cir. 1988))."

The Court noted that the underlying crime, escape, includes "unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, *but does not include a violation of conditions of probation or parole*[.]"[238]The Court agreed that it is possible the charge was mistaken, but found that the sheriff's office's "mistake of law was not so unreasonable as to preclude probable cause for charging Mr. Sinclair with escape and, as a result, charging and arresting Ms. Sinclair with accessory after the fact.[239] The Court noted that the paperwork available to the investigator indicated that escape would be the proper charge for Stephen Sinclair under the circumstances, including the request from the DA.[240] As to whether an accessory charge against Cheryl Sinclair was proper, the ?Court agreed that although she was misidentified, with what the investigator knew at the time, she was properly charged. The letter from the facility upon which he depended gave the investigator more than enough information to support probable cause and linked her both to his leaving, and his return, as she was expected to provide his exclusive transportation. It might not have withstood a trial, when the misidentification would presumably be corrected, but it was more than enough for probable cause. Further, the letter was "not from an anonymous tipster or confidential informant, but instead came from an independently credible source: the secretary of the organization (and wife of the pastor) charged with custody of Mr. Sinclair.[241]

The Court upheld the dismissal.

D.D., on behalf of S.D. v. Scheeler & Springfield Township, 2016 WL 1460338 (6th Cir. 2016)

FACTS: On July 28, 2012, S.D. (female, age 14) was attending a church festival with a friend, Dawson. A fight between two boys broke out and Scheeler, among others, of the Springfield Township PD, responded. The saw, and broke up, a large group of teenagers. S.D. knew one of the boys in the fight and approached a group of officers to tell them. "Because the officers did not listen to her and seemed more focused on getting the two girls to leave the festival, S.D. became irritated. The responding officers, including Scheeler, began walking behind the crowd and asking the festivalgoers to move toward the church parking lot exit." Scheeler later stated he noticed S.D. because the group she was in was "talking loudly and not exiting like the other groups," and that she was "loud and using vulgar language." Ultimately, he claimed she was "having a three-year-old temper tantrum" which hindered their efforts to get the crowd to leave. He advised her she would be arrested, and ultimately did arrest her for disorderly conduct.

S.D. admitted that she may have said something to Dawson about the officers that was derogatory, but does not recall being overly loud, which Dawson confirmed. She admitted stopping so she could call her sister, who was also in the crowd, as she didn't want to leave without her. She claimed Scheeler demanded her phone and then knocked it out of her hand. He then grabbed her and arrested her. Dawson corroborated this information.

S.D.'s juvenile case was dismissed after she completed community service and an anger management assessment. Her father then filed suit on her behalf under 42 U.S.C. §1983, claiming a variety of causes of action, against Scheeler and the city. The District Court granted summary judgement to the defendants on all claims but the false arrest claim against Scheeler. (Notably, Scheeler apparently did not address the false arrest claim in his initial motion for dismissal.) Scheeler appealed.

ISSUE: Is a showing of no probable cause required in a false arrest case?

HOLDING: Yes

[238] Tenn. Code Ann. § 39-16-601(3) (emphasis added)."
[239] See Heien v. North Carolina, 135 S. Ct. 530 (2014) ("The Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law— must be objectively reasonable.")"
[240] See Armstrong v. City of Melvindale, 432 F.3d 695 (6th Cir. 2006) (evaluating an officer's reliance on a prosecutor as a factor in determining the reasonableness of the officer's probable cause determination);
[241] See Wesley v. Campbell, 779 F.3d 421 (6th Cir. 2015); see also U.S. v. Ventresca, 380 U.S. 102 (1965) (explaining that hearsay "may be the basis for issuance of the warrant so long as there is a substantial basis for crediting the hearsay").

DISCUSSION: In his appeal, Scheeler argued that he had argued for probable cause for the arrest in his qualified immunity motion, and the Court agreed that he did "come forward with facts" regarding it and stated that he was entitled to summary judgement on "all" of the constitutional claims. As such, the Court agreed, it had jurisdiction to review it. Although the Court noted that neither party actually briefed those facts, it agreed it could review the matter.

> To state a claim of false arrest, a plaintiff must "prove that the arresting officer lacked probable cause to arrest" her.[242] Probable cause is "reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion."[243] The officer can lawfully arrest the plaintiff so long as there is probable cause to arrest her for some crime, even if the crime for which there is probable cause is different from the stated crime of arrest.[244] To determine whether Scheeler had probable cause to arrest S.D., we consider the totality of the circumstances and whether what he knew at the moment of arrest was sufficient to lead a prudent person to believe S.D. had committed an offense.[245]
>
> Scheeler alleges two potential crimes he had probable cause to believe S.D. committed: disorderly conduct and obstructing official business. We must examine each of these offenses to determine whether there was probable cause. "[S]tate law defines the offense for which an officer may arrest a person, while federal law dictates whether probable cause existed for an arrest."[246] Viewing the facts in the light most favorable to the plaintiffs, Scheeler did not have probable cause to arrest S.D. for either of these offenses.
>
> First, Scheeler lacked probable cause to arrest S.D. for disorderly conduct under Ohio Rev. Code §2917.11(A). Scheeler analogizes S.D.'s conduct to two Ohio cases, where one plaintiff "shout[ed] obscenities in a retail establishment in the presence of customers," and another "loudly protest[ed] a driver's arrest and had to be escorted away" twice from the scene of an accident.[247] The cases Scheeler cites are inapposite. In Twynman, an unpublished case, the extremely agitated plaintiff screamed repeated obscenities at a police officer and behaved in such a manner that the police officer thought he was going to assault him.[248] In Fant, the plaintiff interfered with an arrest in progress.[249] Under the plaintiffs' version of the facts, S.D. was not speaking to Scheeler or loudly enough for him to hear her, and she simply stood near the festival exit in order to call her sister. This conduct did not give Scheeler probable cause to arrest S.D. Ohio's disorderly conduct statute and the First Amendment require more than the uttering, or even shouting, of distasteful words. They require that the speech in question constitute "fighting words."[250] Moreover, there can be no disorderly conduct "[w]here the language is not threatening, does not constitute 'fighting words' and is not likely by its very utterance to inflict injury or provoke the average person to immediate retaliatory breach of peace."[251] Police officers are held to a higher standard than average citizens, because the First Amendment requires that they "tolerate coarse criticism."[252]

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[242] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010) (quoting Voyticky, 412 F.3d at 677).
[243] Id. at 306 (quoting U.S. v. McClain, 444 F.3d 556 (6th Cir. 2005)).
[244] Devenpeck v. Alford, 543 U.S. 146 (2004) ("[The officer's] subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.").
[245] Sykes, 625 F.3d at 306 (quoting Hinchman v. Moore, 312 F.3d 198 (6th Cir. 2002)).
[246] Kennedy v. City of Villa Hills, Ky., 635 F.3d 210 (6th Cir. 2011).
[247] R. 23, Appellant Br., at 27 (citing State v. Twyman, No. 19086, 2002 WL 1483576, at *5 (Ohio Ct. App. July 12, 2002); State v. Fant, 607 N.E.2d 548 (Ohio Ct. App. 1992)).
[248] 2002 WL 1483576, at *1–2.
[249] 607 N.E.2d at 549.
[250] City of Cincinnati v. Karlan, 314 N.E.2d 162 (Ohio 1974). ("[N]o matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unless they are fighting words.").
[251] State v. Wood, 679 N.E.2d 735 (Ohio Ct. App. 1996) (citation omitted).
[252] Kennedy, 635 F.3d at 216; *see, e.g.,* City of Houston v. Hill, 482 U.S. 451 (1987) ("The freedom of individuals verbally to oppose or to challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.")

In City of Kent v.Kelley, the Ohio Supreme Court held that the words "stay away from the fucking door" and "get the fuck out of here" spoken in the presence of a police officer were not fighting words, because they were "not descriptive of a particular person and directed to that person" nor were they "epithets likely to provoke the average person to retaliation."[253] S.D.'s testimony, corroborated by her friend Dawson, is that she was not addressing Scheeler with her speech. She may have used the word "fuck," but for this word to qualify as a fighting word unprotected by the First Amendment, it must have been personally directed at Scheeler, beyond "coarse criticism," and designed to provoke him. Taking the facts in the light most favorable to S.D., her speech did not satisfy any of these requirements. She spoke to Dawson, not to Scheeler, negating any intent to provoke, and what she said was no worse than the speech protected in Kelley. S.D.'s speech did not establish probable cause for her arrest for disorderly conduct. The next question is whether any other aspect of S.D.'s conduct establishes probable cause for her disorderly conduct arrest. As Scheeler argues, Ohio Rev. Code §2917.11(A) also prohibits "creating a condition that presents a risk of physical harm to person . . . by any act that serves no lawful and reasonable purpose of the offender." Ohio Rev. Code § 2917.11(A)(5). "Physical harm to person means any injury, illness, or other physiological impairment, regardless of its gravity or duration."[254] Construing the facts in the light most favorable to S.D., there is no evidence that her remaining at the festival, instead of immediately exiting, created a risk of physical harm to others. Under these facts, Scheeler did not have probable cause to arrest S.D. for disorderly conduct.

The Ohio offense of obstructing official business provides for criminal liability for a person who "without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties."[255] Thus, the elements of the offense are: "(1) the performance of an unprivileged act (2) with the purpose of preventing, obstructing or delaying the performance by a public official of an authorized act within his official capacity (3) which hampers or impedes the public official in the performance of his lawful duties."[256] With respect to the element of "purpose to obstruct," "[a] person acts purposely when it is his specific intention to cause a certain result."[257] The statute also requires an affirmative act that interrupts police business; "[a] person may not be convicted of the offense simply by doing nothing."[258] The unprivileged act must actually hamper or impede the public official in the performance of his duties, and "there must be some substantial stoppage of the officer's progress."[259] Taking the facts in the light most favorable to the plaintiffs, there is no evidence that S.D. intended to impede Scheeler's crowd control measures by staying within the festival grounds. Rather, S.D. told Scheeler multiple times that she was waiting to leave the festival until she could reach her younger sister and willing to depart as soon as her sister was with her. Because S.D. lacked the purpose of obstructing Scheeler, and she informed him of her reason for remaining at the festival, he lacked probable cause to arrest her for obstructing official business.

As to whether S.D. was actually convicted, the Court noted that nothing indicates that in fact, she admitted to the allegations, although she accepted a way to dismiss the case.

With respect to the second prong of the analysis, the Court agreed that "Scheeler's arrest of S.D. was unreasonable because no competent officer would have found probable cause to arrest S.D."[260] The Court upheld the denial of Scheeler's appeal.

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[253] 337 N.E.2d 788, 789–90 (Ohio 1975) (holding that this language did not violate a local disorderly conduct ordinance) (citation omitted).
[254] City of Marion v. McGlothan, No. 9-77-2, 1977 WL 199588, at *4 (Ohio Ct. App. June 28, 1977).
[255] Ohio Rev. Code § 2921.31(A).
[256] Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005) (citation omitted).
[257] N. Ridgeville v. Reichbaum, 677 N.E.2d 1245 (Ohio Ct. App. 1996).
[258] Lyons, 417 F.3d at 573–74 (citing State v. McCrone, 580 N.E.2d 468 (Ohio Ct. App. 1989)).
[259] State v. Wellman, 879 N.E.2d 215 (Ohio Ct. App. 2007) (citation omitted).
[260] *See* Leonard v. Robinson, 477 F.3d 347, 355 (6th Cir. 2007) ("We will not grant immunity to a defendant if no reasonably competent peace officer would have found probable cause.")

Emanuel v. Wayne, 2016 WL 3383419 (6th Cir. 2016)

FACTS: In late September, 2011, in response to complaints of prostitution and drug activity, Wayne County (MI) deputy sheriffs conducted a surveillance operation. On September 28, Officer Tanner (working with Detroit PD) saw Gross flagging down vehicles. She knew Gross had been previously cited, multiple times, for prostitution. She finally got into one of the vehicles. Tanner communicated the fact to the team and followed the vehicle. Officer Turfe also began tailing the vehicle until it stopped in a motel parking lot. Officers Turfe and Mathews approached the vehicle on foot and ordered Gross to get out. She was given Miranda and agreed that they were planning to have sex but that money had not been discussed. The driver, Emanuel, refused to speak to them and was placed under arrest. As they continued to talk, Gross told Officer Mathews that she'd had sex with Emanuel before and eventually, after getting Miranda, Emanuel told Officer Turfe the same thing.

> Later, however, Emanuel vehemently denied that he had given any such information to Turfe during the officer's questioning or that he had confessed to any crime whatsoever. In fact, during his deposition testimony, Emanuel cast a radically different light on his interaction with Gross. According to Emanuel, he did not know that Gross was working as a prostitute and did not pick her up in order to engage in sexual activities. Rather, he asserted that he was in the area at the time seeking clues to the murder of a friend, Raina Blasius, whom he had represented when Blasius faced loitering and other misdemeanor charges. Because Blasius had been murdered in the vicinity of the Derby Street/Remington Street intersection, Emanuel claimed that he had driven to that area from his office in an effort to locate anyone who could offer information about the murder. When he saw Gross walking in the area, he recognized her as a former companion of Blasius and thus stopped to see whether she knew anything about the murder, despite the fact that Emanuel claimed that he never had spoken to Gross before September 28.
>
> Emanuel also said that when Gross indicated a willingness to speak with him about Blasius, he invited her into his car and drove to the De Lido Motel, not to engage in any sexual activity, but because the motel parking lot was lighted and was one of the safer locations in the area. Emanuel said that, once in the lot, he and Gross remained in the car talking about Blasius "for about 15, 20 minutes before the officers approached." He testified further that after handcuffing him, Turfe screamed at him and ordered him to admit that he had driven Gross to the motel for a sexual liaison. Emanuel claimed that he refused to say anything at all to Turfe and just "star[ed] at the guy dumbfounded."

Emanuel (and Gross) were cited on state prostitution charges and Emanuel's vehicle was impounded. Eventually, he paid $3,600 to retrieve the vehicle. His state charge was dismissed without prejudice when no officer appeared at trial. He filed a federal lawsuit under 42 U.S.C. §1983 "against Officers Tanner, Turfe, and Mathews for arrest without probable cause and for malicious prosecution; against Turfe for failure to supervise; and against Wayne County for failure to train its officers properly. Emanuel's complaint also included a state-law claim against Tanner, Turfe, and Mathews for gross negligence in the performance of their official duties." However, soon thereafter, the state charge was reissued and the lawsuit stayed.

At the state court trial, the Court agreed the stop was reasonable, but ruled that the prostitution charge had not been sufficiently proven, as the judge agreed that either side's story was plausible and that the idea that a lawyer would blurt out a confession is less credible. The Court noted that "the veracity of the testimony of the officers is also in question with respect to evidence that showed that this incident was originally scheduled for trial and was ultimately dismissed without prejudice because the officers failed to appear. Only after the defendant filed a federal action against the officers challenging their conduct on the night in question, was this matter re-issued."

The stay was lifted and the officers filed for summary judgement. In response, and for the first time, Emanuel produced "an affidavit from Leiann Gross that had been sworn to two months earlier" in which she swore that she too had never confessed to anything illegal. Because that violated a prior discovery request, by nothing being produced when required, Emmanuel was ordered to make Gross available for a deposition within the month. He was unable to do so and her affidavit was stricken, and the trial court granted qualified immunity and summary judgement to the officers. Emanuel appealed.

ISSUE: Is a probable cause arrest valid?

HOLDING: Yes

DISCUSSION: Initially, the Court had ruled that the affidavit need not be excluded because she was listed as a potential witness, which complied with the federal disclosure rules. However, the rules also require that any material concerning the party may have to support the claims or defenses must also be turned over initially, and doing so does not relieve the part of future discovery obligations, in effect, it becomes a continuing obligation. The Court agreed that "compliance with these requirements of the procedural rules did not occur here." He clearly had the affidavit for two months before it was produced, and after the period of court-ordered discovery had ended. As a result, they were unable to locate her, as the address where she had been living had been burned to the ground. The trial court had agreed that Emanuel's actions were "both unjustified and harmful."

Looking to the substance, the Court agreed that:

> "[I]t is well established that any arrest without probable cause violates the Fourth Amendment."[261] An arrest is supported by the requisite probable cause when, at the time of that arrest, "the facts and circumstances within [the officer's] knowledge and of which [she] had reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense."[262] Significantly, "the Fourth Amendment does not require that a police officer *know* a crime has occurred at the time the officer arrests or searches a suspect."[263] Rather, "[p]robable cause requires only the probability of criminal activity, not some type of 'prima facie' showing."[264]

However, the "determination of whether probable cause for an arrest existed at the time of a seizure by government officers is a question to be presented to a jury, "unless there is only one reasonable determination possible."[265]This case presents just such a situation, rendering unnecessary the presentation of the issue of probable cause to a jury. At the time he placed Emanuel under arrest, defendant Turfe knew that one of his fellow officers had observed Emanuel speaking with a known prostitute in an area known for its prostitution and drug-trafficking activity. Furthermore, the woman was seen getting into Emanuel's car and driving with him to the parking lot of a motel frequented by prostitutes and their "clients." Admittedly, neither Officer Turfe nor Officer Mathews saw Emanuel engage in any sexual activity with the woman and did not see money being transferred between the two individuals. Nevertheless, once Turfe and Mathews approached the vehicle and asked the occupants to exit the car, Leiann Gross, the passenger, admitted to the officers that Emanuel had picked her up on several previous occasions in order to engage in intercourse with her and that Emanuel had driven her on this occasion to the De Lido Motel for sexual activities, even though she and Emanuel had not discussed payment prior to the arrest. With such information in his possession, Turfe clearly had probable cause to believe that Emanuel had committed, was committing, or was

[261] Crockett v. Cumberland Coll., supra.
[262] Wesley v. Campbell, 779 F.3d 421 (6th Cir. 2015) (alterations in original) (quoting Beck v. Ohio, 379 U.S. 89 (1964)).
[263] U.S. v. Strickland, 144 F.3d 412 (6th Cir. 1998) (emphasis in original).
[264] Criss v. City of Kent, 867 F.2d 259 (6th Cir. 1988 (citing Illinois v. Gates, 462 U.S. 213 (1983)).
[265] *see* Pyles v. Raisor, 60 F.3d 1211 (6th Cir. 1995).

about to commit an act prohibited by the Detroit ordinance criminalizing "receiving or admitting" a person into any place in order to commit any act of prostitution.[266]

Emanuel, on the other, protested that he had the affidavit, but the Court agreed it was properly excluded and that the information the officers had was "more than sufficient to establish the necessary probable cause to arrest Emanuel for the offense with which he was charged."

Further:

> Nor does the fact that a state-court judge ultimately acquitted Emanuel of the charged conduct vitiate the determination that Turfe had probable cause for an arrest. The burden of establishing probable cause to support an arrest is not as onerous as the burden of establishing proof beyond a reasonable doubt to support a criminal conviction. Thus, the same evidence that is sufficient to justify an arrest also can be found insufficient in a different, more-exacting context.

Even though he put forth another reason for his actions, officers were not obligated to believe it. The Court agreed that summary judgement was proper on the arrest. With respect to malicious prosecution, even though it was true that the prosecution was restarted after he filed the lawsuit, the decision to do so was with the prosecution alone, and there was no evidence that they were unduly influenced by the sheriff's office. Finally, the Court noted, his confession (or lack of one) had no bearing on the arrest, which took place before the confession anyway.

On a side note, the Court discussed the claim with respect to the "exorbitant fee" related to the vehicle towing and storage. The Court noted that also apparently other situations arose in similar arrests, where the officers did not appear, but there was no indication those arrests lacked probable cause, instead, indicated "at best, "a lack of vigor in prosecution," not a sanctioned custom, practice, or policy of arresting without probable cause individuals seeking sexual interludes with prostitutes." The seizures were justified under state and local law.

The Court affirmed the decision.

Miller v. Davis, 2016 WL 3472004 (6th Cir. 2016)

FACTS: For years, the Robbins lived next door to their daughter and her husband, the Millers. In 2004, after Lester Robbins passed away, Bettie Robbins moved in with the Millers. In 2007, Bettie began to develop dementia and eventually was moved to a nursing facility. In 2009, Larry Robbins (her son) began to suspect that the Millers had financially exploited Bettie, as her finances were significantly depleted. Bettie revoked the power of attorney she'd given to her daughter and gave it to her other children.

Larry filed a theft report, which was investigated by Det. Ullom, Delaware County SO. He eventually detailed what he believed to be improper charges and withdrawals of approximately $100,000. The matter ended upon at the grand jury, which indicted the Millers. The case was heavily publicized by the prosecutor and included the Millers' mugshots and details of the case. Although acquitted at trial, the judge found sufficient cause to have brought the case. At that time, the Millers requested that the information about their case be removed from the prosecutor's website, but it stayed up to a year later.

The Millers brought suit under 42 U.S.C. §1983 against both the Sheriff's Office and the prosecutor. The cases were dismissed and the Millers appealed.

ISSUE: Is an officer immune from prosecution in a malicious prosecution case if they do not make the decision to go forward, but someone else does?

[266] Detroit City Code § 38-9-4(b)."

HOLDING: Yes

DISCUSSION: With respect to the malicious prosecution, the Court noted that under Sykes, "f their arrest and prosecution were supported by probable cause, their claim necessarily fails.[267] "[I]t has been long settled that the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer."[268] So long as "[t]here is no evidence of perjured testimony or irregularity in the grand jury proceeding," an indictment gives rise to a conclusive presumption that there was probable cause to support an arrest..[269]

However, "an exception to the Barnes principle applies "where the indictment was obtained wrongfully by defendant police officers who knowingly presented false testimony to the grand jury."[270] The exception extends to "officers who testify with a reckless disregard for the truth."[271] The Millers were unable to produce any evidence that there was "perjured testimony or irregularities in the grand jury proceedings." As such, Ullom enjoyed qualified immunity.

In addition, "Sixth Circuit law dictates that a claim for malicious prosecution against a police officer cannot survive without evidence that the officer caused the plaintiff to be prosecuted.[272] Here, no evidence suggests that Ullom made, influenced, or participated in Sleeper's decision to prosecute the Millers." Although the report was "indisputably fundamental to the commencement of the criminal proceedings against" the Millers, there was no indication that the investigation, however arguably flawed, was constitutionally deficient. (The data started in 2004, when Bettie was still making her own decisions, and Larry was not involved with the family directly during that time.) The Court noted that ""once probable cause is established . . . the police have no constitutional duty to investigate further or to seek potentially exculpatory evidence."[273] Although Ullom may have mischaracterized his conversations with the Millers, specifically, the husband, it was again not so deficient as to negate probable cause.

The Court affirmed the dismissals.

42 U.S.C. §1983 – EXIGENT ENTRY

Smith v. City of Wyoming (Ohio), 821 F.3d 697 (6th Cir. 2016)

FACTS: In February, 2012, Glenda Smith and Joseph Johnston divorced. Between that date and December, 2013, she'd had four interactions with Wyoming police concerning the treatment of her two daughters (pre-teen and teen). Of most importance is a visit on April 2, 2013, around noon, when Johnston called the police to report that Tiffany (then 10) told him "that a man whom she did not know was in Smith's house, and that his presence was making her uncomfortable." Sgt. World and Officer Murphy were dispatched. Tiffany answered the door and the officers went in, although there was a dispute as to whether the child actually consented. They were directed upstairs to the bedroom door and Smith opened it, but there was dispute as to what occurred next, specifically. While Smith and the man (Chinn) stated she was not intoxicated, the officers later stated that both were "visibly drunk."

> All agree that Officer Murphy attempted to grab Smith's hand and that she pulled it away. But Smith claims that she had stepped out of the bedroom and was standing in the hallway when she

[267] See Bielefeld v. Miller, et al. v. Davis, et al. Haines, 192 F. App'x 516, 520 (6th Cir. 2006) ("The existence of probable cause for an arrest and prosecution defeats a Section 1983 claim under the Fourth Amendment.") (citing Braley v.City of Pontiac, 906 F.2d 220 (6th Cir. 1990)).
[268] Barnes, 449 F.3d at 716 (quoting Higgason v. Stephens, 288 F.3d 868 (6th Cir. 2002) (internal quotation marks omitted)).
[269] Sykes v.Anderson, 625 F.3d 294 (6th Cir. 2010) (quoting Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006)). See Bakos v. City of Olmsted Falls, 73 F. App'x 152 (6th Cir. 2003)
[270] Robertson v. Lucas, 753 F.3d 606, 616 (6th Cir. 2014) (quoting Mott v. Mayer, 524 F. App'x 179 (6th Cir. 2013)).
[271] Id. (citing Sykes, 625 F.3d at 305).
[272] See Skousen v. Brighton High Sch. , 305 F.3d 520 (6th Cir. 2002) (holding that where "[t]here is no evidence that [the officer] made or even was consulted with regard to the decision to prosecute [the plaintiff]," the officer cannot be held liable for malicious prosecution).
[273] Martin v. Maurer, 581 F. App'x 509 (6th Cir. 2014) (citing Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999)).

> was grabbed, while Appellees aver that Officer Murphy grabbed her to pull her out of the bedroom. Sergeant World then arrested Smith for obstructing official business, handcuffed her, guided her by the arm to his police car, and eventually drove her to a local detention facility. Smith concedes that she did not complain of any pain or injury. Chinn showed his identification to the officers and was allowed to leave. The criminal charge against Smith was ultimately dropped.

A month later, Tinny called again, stating that her mother had threatened to kill her. Sgt. Ballinger and Officer McGillis responded. "Smith conceded to the officers that she might have made such a threat in the heat of an argument. The officers mediated the dispute between Smith and her daughter and left." Finally, on December 6, Johnston took Tiffany to a police station and showed Sgt. Riggs a bruise, which Tinny claimed was caused by Smith striking her multiple times. Officer Riggs went to the house the next day; Smith denied the injury. Tiffany later recanted, saying she'd gotten the injury in a fight with her older sister, Jasmine. "Smith claims that during the conversation she attempted to close the front door and that Riggs briefly put his foot in the door frame to prevent it from shutting. Riggs denies this."

Smith filed suit against the various officers involved in the responses, as well as the City of Wyoming, under 42 U.S.C. §1983, claiming unlawful entry.. The Court granted summary judgement to the officers and the City, and Smith appealed.

ISSUE: Are entries permitted when an officer reasonably believes there is an emergency?

HOLDING: Yes

DISCUSSION: Among other claims, Smith argued that the officers "interfered with her family relationships" The Court agreed "that the police conduct in this case did not interfere with Smith's family relationships in violation of the Constitution. The officers' actions were a far cry from those found to have violated "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child[ren]."[274]

The Court addressed three Fourth Amendment claims: unlawful entry (i.e., illegal searches) (Count 1), unlawful arrest (i.e., illegal seizure) (Count 2), and excessive force (Count 5). Count 1 is best understood as four separate claims based on four separate incidents: the entry of police officers into Smith's home with the purported consent of the friend who opened the door on March 9, 2012; their entry with what they claim was Tiffany's consent on April 2 and May 2, 2013; and an officer allegedly placing his foot in the doorway on December 7, 2013. Count 2 is based on Smith's arrest during the April 2 encounter, and Count 5 alleges the use of excessive force during that arrest.

> First, in assessing a constitutional claim against a law enforcement officer, with the officer invoking a qualified immunity defense, the Court "must answer two questions: (1) "whether the facts that a plaintiff has alleged" at the motion to dismiss stage "or shown" at the summary judgment stage "make out a violation of a constitutional right"; and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct."[275] The first issue is whether the plaintiff has established her prima facie case for a violation of her constitutional rights. The second is whether the officer is shielded from liability even if a violation occurred." These questions could be addressed in either order.

Further:

> The qualified immunity question itself can be understood as a two-part analysis.[276] First, we consider "the clarity of the law at the time of the alleged civil rights violation" to determine whether

[274] Santosky v. Kramer, 455 U.S. 745 (1982) (holding that severing parental rights based only on a "fair preponderance of the evidence" violated due process); see also Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (holding that a housing ordinance unduly restricting an extended family's right to live together in a single-family home violated due process); Stanley v. Illinois, 405 U.S. 645 (1972) (holding that a statute automatically denying a father's parental rights upon the death of the mother, based solely on the fact that the parents were not married, violated due process and equal protection)."

[275] Pearson, 555 U.S. at 232 (quoting Saucier v. Katz, 533 U.S. 194 (2001)).

[276] See Matalon v. Hynnes, 806 F.3d 627 (1st Cir. 2015).

> the right at issue was clearly established.[277] Second, we consider the specific factual circumstances known to the officer to determine whether a reasonable officer would have known that her conduct violated that right. Overall, this analysis requires us to define the plaintiff's asserted right with specificity, and focus on the particular facts known to the officer at the time.[278] "The relevant inquiry is whether existing precedent placed the conclusion" that the defendant violated the law "in these circumstances 'beyond debate.'"[279]

With respect to the four entries made by the officers, the Court agreed that the "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"[280]. Entrance by the police into a home—which constitutes a search for Fourth Amendment purposes—is permissible only where justified by a warrant, exigent circumstances, or valid consent.[281]

However, consent may lawfully permit the police to enter even if it is not given by the occupant whose Fourth Amendment rights are at issue. A third party with a "sufficient relationship to the premises" may consent in the absence of the occupant in question.[282] A third party's "common authority" "rests [] on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."[283] The police may also lawfully enter a home with the consent of a party who had only apparent authority to admit them, "if 'the facts available to the officer[s] at the moment [would] warrant a man of reasonable caution in the belief that [there was] consent [from a] party [that] had authority over the premises.'"[284] Even with the consent of a person with common authority, however, the police generally may not enter when another occupant of the home is physically present and expressly refuses to permit entry.[285]

In addition, it agreed, "consent to enter need not be explicit. It "may be in the form of words, gesture, or conduct."[286] But it is valid only if given voluntarily,[287] and whether consent is "'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances."[288]

Entry may also be made upon exigent circumstances, when an "especially serious and time-sensitive law enforcement need requires it.[289] A threat to the safety of a minor child within a home constitutes an exigent circumstance under at least some circumstances.[290]

Against this legal background, the Court overlaid the facts of each entry. With the first entry, when the officers went to the house to investigate a claim that Smith had been intoxicated at her children's' school, the Court found nothing to indicate that the officers considered the matter urgent – given there was a several hour time lag – and that instead, the "police perceived their task to be a routine check on Smith to ensure the welfare of her children." As such, the Court agreed, their brief entry was inappropriate and vacated the judgment in their favor on that issue.

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[277] Id. (quoting Maldonado v. Fontanes, 568 F.3d 263 (1st Cir. 2009)).
[278] Mullenix v. Luna, 136 S. Ct. 305 (2015) (per curiam).
[279] Id. at 309 (quoting Ashcroft v. al-Kidd, 563 U.S. 731 (2011))."
[280] Welsh v. Wisconsin, 466 U.S. 740 (1984) (quoting U.S.v. U.S. District Court, 407 U.S. 297 (1972))
[281] See Payton v. New York, 445 U.S. 573 (1980) (requiring a warrant in the absence of "exigent circumstances"); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (noting the validity of "a search authorized by consent")."
[282] U.S. v. Matlock, 415 U.S. 164 (1974) (holding that a warrantless search of a bedroom with the consent of a person cohabiting with the defendant and claiming to be his wife did not violate defendant's Fourth Amendment rights).
[283] Id. at 171 n.7; cf. Illinois v. Rodriguez, 497 U.S. 177 (1990) (finding no common authority where a person sometimes spent the night at the apartment but never went there when the primary occupant was not at home).
[284] U.S. v. Kimber, 395 F. App'x 237, 243-44 (6th Cir. 2010) (alteration in original) (quoting Rodriguez, 497 U.S. at 188).
[285] See Georgia v. Randolph, 547 U.S. 103 (2006).
[286] U.S. v. Carter, 378 F.3d 584 (6th Cir. 2004) (en banc) (quoting U.S. v. Griffin, 530 F.2d 739 (7th Cir. 1976)).
[287] Ohio v. Robinette, 519 U.S. 33 (1996),
[288] Schneckloth, 412 U.S. at 227."
[289] See Payton, 445 U.S. at 590; Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) (holding that exigent circumstances permitted a warrantless entry into a home where "delay in the course of an investigation . . . would gravely endanger [the officers'] lives or the lives of others").
[290] Cf. Brigham City v. Stuart, 547 U.S. 398 (2006) (holding that a warrantless police entry did not violate the Fourth Amendment where officers standing outside a house witnessed a fight between a juvenile and four adults inside).

With respect to the April and May entries, the Court noted, the officers were responding to a 911 call from someone inside the house. This, the Court agreed, was significant. In other cases. the Court had "found a call to emergency services highly relevant to the issue of exigency.[291] The 9-1-1 system is intended to give callers a way to obtain police help expeditiously, and Johnston and Tiffany's use of the system reflects their belief that they needed immediate help. Calling 9-1-1 also brings a degree of accountability. In many jurisdictions, including Ohio, misusing the system is a misdemeanor. " In both instances, Tiffany arguably indicated consent to enter. In the second case, in fact, she was waiting outside upon their arrival. As such, it was objectively reasonable for the officers to believe, "even if mistakenly, that they had authority to enter the house." The Court agreed the officers were entitled to qualified immunity on claims related to those entries.

Finally, on the last trip, on December 7, 2013, "no police officer walked into Smith's home on December 7, 2013, though Officer Riggs did come to her door and conducted a "knock and talk" there. The subject was whether the bruise on Tiffany's head had been caused by Smith, as Tiffany claimed. Smith claims that she tried to shut the door while Officer Riggs was still there, but that he placed his foot in the doorway, briefly preventing her from closing it. The refusal to allow Smith to conclude the talk, by means of the officer's foot in the door, is the basis for this claim of unlawful entry."

The Court agreed that "

> Knocking on the front door of a home in order to speak with the occupant—a so-called "knock and talk"—is generally permissible.[292] Though the threshold of a house is especially protected by the Fourth Amendment,[293], and police may not gather information even from a person's front porch without authorization, the police are authorized to conduct a "knock and talk" for as long as they have consent.[294] When that consent ends, so does police authority to continue the interaction.;[295] When an officer coerces a person to answer his questions, or forces his way into a private home, he exceeds the scope of a consensual "knock and talk" and thus intrudes on Fourth Amendment rights."

Although Riggs did not agree he had momentarily blocked the door, for the purposes of the appeal, he conceded that point. However, the Court agreed, there is no case law "holding that preventing the closure of the door to a home to briefly extend a consensual interview violates the Constitution." The only relevant case law dealt "with intrusions that were unauthorized *ab initio*, not those that prolong an otherwise consensual encounter." The Court agreed there was no violation of clearly established law, and as such, Riggs was entitled to summary judgement for that instance.

Finally, the Court addressed the arrest made for "obstructing official business." Certainly an arrest made without probable cause is unlawful.[296] In this case, the Court had to look to the "particular crime for which the officers arrested Smith.[297] The elements of the Ohio offense required proof of five elements: "(1) an act by the defendant; (2) done with the purpose to prevent, obstruct, or delay a public official; (3) that actually hampers or impedes a public official; (4) while the official is acting in the performance of a lawful duty; and (5) the defendant so acts without privilege."[298] Ohio case law agreed that "probable cause could not have been based on Smith's words," alone. Her withdrawal of her hand could have been purely an involuntary response to an unwanted touch. From that point on, she cooperated with the officers.

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[291] See Johnson v. City of Memphis, 617 F.3d 864 (6th Cir 2010).**9**
[292] U.S. v. Thomas, 430 F.3d 274 (6th Cir. 2005).
[293] see, e.g., Welsh, 466 U.S. at 748
[294] Florida v. Jardines, 133 S. Ct. 1409 (2013), See Thomas, 430 F.3d at 277.
[295] See Kentucky v. King, 563 U.S. 452 (2011) ("[W]hether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. . . . And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.") U.S. v. Spotted Elk, 548 F.3d 641 (8th Cir. 2008) ("[A] police attempt to 'knock and talk' can become coercive if the police assert their authority, [or] refuse to leave.").
[296] Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005).
[297] See Ingram v. City of Columbus, 185 F.3d 579 (6th Cir. 1999) ("To determine whether officers had probable cause to arrest an individual, we must look to the law of the jurisdiction at the time of the occurrence.")."
[298] Halasah v. City of Kirtland, 574 F. App'x 624 (6th Cir. 2014); see also Patrizi v. Huff, 690 F.3d 459 (6th Cir. 2012) (identifying the same elements, but dividing them into three elements instead of five); Lyons, 417 F.3d at 573 (same)."

The Court noted, in particular, that Smith "did not verbally abuse the officers or threaten physical resistance." Further, the statute was clearly established in Ohio and that the officers should have been aware of the elements needed to make the case. As such, the officers were not entitled to qualified immunity on the arrest issue. However, the Court did not agree that the force used against her in that instance was excessive.

In toto, the Court affirmed the lower court on some issues, and vacated its decision on others.

42 U.S.C. §1983 – FORCE

Zuhl v. Haskins, 2016 WL 3346071 (6th Cir. 2016)

FACTS: At about 6 a.m., on January 29, 2010, Deputy Haskins led a team to execute a search warrant at the Zuhl home. The couple, Jason and Anne, was believed to be selling crack cocaine from the home. When they arrived, lights were on inside and out, so Jason could see out and the deputies could see in. Jason responded to a knock. Thinking the men outside were work friends of his wife, he went to wake her. The deputies, however, "watching Jason through the window, thought it suspicious that he had turned and gone back into the house upon seeing them. Consequently, they smashed in the door and entered." At that point, he turned back around and assumed a surrender position. He later alleged that Haskins "clobbered him" in the face with a flashlight, and he was taken to the ground and handcuffed. Later booking photos indicated a "shiner." Marijuana, pills and drug paraphernalia were found, along with properly registered firearms, which were later returned. Jason was charged but Anne was not.

Jason Zuhl filed suit under 42 U.S.C. §1983, alleging excessive force. The deputy moved for summary judgement, stating he did not strike Jason with the flashlight, but did accidentally collide with Jason when he came around the corner – and that Jason readily surrendered. Because there was disagreement as to the genuine issues of material fact as to the degree of force, and how it occurred, the court denied the motion. Deputy Haskins filled an interlocutory appeal.

ISSUE: In a qualified immunity discussion, but officers accept for purposes of argument the plaintiff's version of the facts?

HOLDING: Yes

DISCUSSION: The Court began:

> Qualified immunity shields government officials in the performance of discretionary functions from standing trial for civil liability unless their actions violate clearly established rights[299]. A plaintiff who brings a § 1983 action against such an official bears the burden of overcoming the qualified immunity defense.[300] At the summary judgment stage, the plaintiff must show that (1) the defendant violated a constitutional right and (2) that right was clearly established. In so doing, the plaintiff must, at a minimum, offer sufficient evidence to create a "genuine issue of fact," that is, "evidence on which [a] jury could reasonably find for the plaintiff."[301]

The Court will not, however, address a challenge that is "purely fact-based, lacking any issue of law, it "does not present a legal question in the sense in which the term was used in Mitchell,"" In the deputy's brief on the matter, although he claimed "to be accepting Jason's version of the facts, but then flatly disputes Jason's evidence and relies on his view of the evidence to argue that his actions were objectively reasonable." The Court gave several examples, noting that in such cases, it had "no interlocutory appellate jurisdiction." In this case, Deputy Haskins was "arguing that his testimony, his

[299] Harlow v. Fitzgerald, 457 U.S. 800 (1982).
[300] Quigley v. Tuong Vinh Thai, 707 F.3d 675 (6th Cir. 2013).
[301] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

evidence, and his version of the events are more believable than Jason's testimony, evidence, and version of the events. That is a factual dispute.[302] In fact, the district court aptly characterized this dispute as competitive "he said, she said" allegations. More importantly, as we have explained, this is the type of challenge that is unreviewable in this interlocutory appeal."

As such, and "accepting Jason's version of the facts and the district court's inferences, as we must in deciding this interlocutory appeal as a matter of law, we conclude that the force as alleged was excessive, in violation of Jason's constitutional rights. Moreover, the right to be free of such excessive force was clearly established as of January 29, 2010, the morning at issue here." The dismissal of the motion was affirmed.

Williams v. Morgan, 2016 WL 3346072 (6th Cir. 2016)

FACTS: Officer Morgan (Akron, OH, PD) is the SRO for the Jennings Community Learning Center (CLC), a middle school. T.W., a minor female, alleged that on October 26, 2012, she had just transferred to the school the day before, as a result of disciplinary problems at her prior school. That morning, she and her classmate got into a serious argument, which resulted in a trip to the principal's office. T.W. was suspended for five days, but the other student was not disciplined. T.W. was "apparently enraged," and as she left, she tore several posters from the walls. Officer Morgan later characterized this as criminal disorderly conduct and confronted her in a stairwell a little later.

> Deciding that T.W. was being defiant (by putting one foot behind her and her hands on her hips), Officer Morgan decided to seize her physically by pushing her up against the hallway lockers, bending her left arm behind her back, and eventually compelling her submission via this restraint. According to T.W., during this time, Officer Morgan was making threatening comments, whereas T.W. was pleading to be let go due to the pain in her arm. Eventually, still holding her by that arm, Officer Morgan escorted her to the principal's office. According to T.W., while they were waiting in the principal's office, Officer Morgan continued to hold her by that arm and to threaten her verbally.

Although there was no sound, a video captured the actions of the two. From the video, the Court noted that as T.W. retreated, "Officer Morgan gets his hands on her enough to push her sharply against the lockers on the far side of the hall (left side of the frame). As she bounces off the lockers, he takes hold of her and turns her face-first into the lockers, leaning his weight against her and then taking hold of her left arm and bending it behind her back." A number of students were present during the altercation. He had her "left arm bent severely behind her back, both of her feet come up off the floor. T.W. is squirming for relief while Officer Morgan is leaning in with his face and mouth close to her ear and appears to be talking to her. For the next 15 seconds, Officer Morgan holds her there, her face against the lockers and left arm pinned behind her, apparently talking in her ear. Then he begins to walk her roughly down the hall (away from the camera), still holding her arm behind her as she squirms." However, she was never charged with a crime.

It was later discovered that T.W. suffered a broken arm, which she alleged occurred when he "applied such force that he physically lifted her off of the ground." Her mother, Williams, filed a lawsuit on her behalf, claiming excessive force under 42 U.S.C. §1983. Officer Morgan moved for summary judgement, claiming the "technique he used was a low-level force, compliance tactic taught by the Akron Police Department." The District Court denied the motion and Morgan appealed.

ISSUE: May a court use video when determining summary judgement?

HOLDING: Yes

[302] See Oliver v. Greene, 613 F. App'x 455 (6th Cir. 2015).

DISCUSSION: The Court noted that it had no jurisdiction over factual disputes, only legal disputes. In this case, T.W. argued that she was doing what she'd been told, making her way to the principal's office, as she'd been ordered, when Morgan encountered her in the stairway. Properly considering it from her point of view, the trial court made certain inferences, as allowed, including that "n whole, this was merely an unruly student in a school setting (a commonplace occurrence that teachers handle routinely, without the use of any force); at this moment, T.W. posed no safety threat to Officer Morgan or any other students; and Officer Morgan did more than just restrain T.W. with an "arm-bar," he forced her up against the lockers to add to the force and used his "massive" size advantage to physically lift her off the ground by the arm, which apparently broke her arm. The district court also recognized that Officer Morgan refused to let her go, despite her pleading, and instead escorted her using that continued pressure, which a jury could deem gratuitous."

Officer Morgan, however, sought to have T.W.'s evidence rejected, and instead, encouraged the Court to use his version of the facts, which justified the force he used. The Court noted: "while we are certainly skeptical about the truth of Officer Morgan's assertions, our assessment of the evidence at this point is irrelevant. Simply put, this is exactly the type of factual dispute for which we have no interlocutory appellate jurisdiction."[303]

Despite the officer's assertions, the Court, in viewing the video noted that "

> Officer Morgan is the clear aggressor; he pursues T.W. into the hallway, reaching for her neck or upper chest; when he catches her, he pushes her sharply against the lockers, physically turns her body towards the lockers, bends her left arm behind her back, and leans in close, apparently pressing his body against hers and speaking into her ear. He is significantly larger than T.W. and either lifts her or holds her off the floor by that arm, as both of her feet are off the floor while he holds her by the arm, which is bent severely behind her back. While T.W. does appear to squirm or writhe in response to the pressure on, and likely pain in, her arm, she does not necessarily appear defiant, uncooperative, or confrontational. She appears scared and wounded. Early in the video, as Officer Morgan attempts to grab her by the throat or upper chest, T.W. does attempt to fend off his hands as she retreats from him into the hallway, but such an instinctive defensive response does not, at least in this video, demonstrate a need for physical restraint. At no point does T.W. appear to be grabbing or kicking at Officer Morgan.

The Court looked as well, at his assertion that the hold he used was properly, stating that:

> First, the mere fact that this particular hold, when executed properly, is considered low-level force and is a recommended tactic, is meaningless in a circumstance of misuse or misapplication, as is alleged here. For example, a handshake, in and of itself, can hardly be considered force at all, let alone excessive force; but if the larger, stronger participant were to squeeze so hard or twist so far as to break the other's bones, we would not hold as a matter of law that the force was not excessive just because the interaction was "merely a handshake." Nor could we reasonably conclude that the prohibition against such bone-crushing force was not clearly established because the case law is devoid of cases specifically forbidding handshakes. *See*, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (explaining that "officials can still be on notice that their conduct violates established law even in novel factual circumstances"). This argument, premised as it is on faulty or omitted facts, is as irrelevant as it is misguided.
>
> And that leads to the second qualifier: this argument relies entirely on facts that contradict the plaintiff's proffered evidence, the incontrovertible video recording, and the district court's determinations and inferences. Consequently, we must reject or ignore this argument.

Officer Morgan asserted that his force was not excessive, but the Court, looking at

[303] See, e.g., Ortiz, 562 U.S. at 190; Johnson, 515 U.S. at 307; Romo, 723 F.3d at 673-74; DiLuzio, 796 F.3d at 611.:

> T.W.'s version of the evidence, the irrefutable video recording evidence, and the district court's findings and inferences, Officer Morgan needlessly instigated an altercation with this 13-year old girl, first verbally and then physically. Using his size advantage and compliance-hold training, he aggressively pursued, seized, and manipulated her to the point that he broke her arm. He then maintained this physical restraint and pressure on her broken arm, despite her pleas for relief, all the while threatening or menacing her verbally.
>
> The underlying "crime" in this case was that T.W. tore some paper posters off the school hallway wall, which the district court characterized as merely a temper tantrum or unruly student behavior. Despite Officer Morgan's contention that was a serious crime (criminal damaging and disorderly conduct), we are doubtful that a court would convict her of such charges, a prosecutor would pursue such charges, or a reasonable police officer would arrest her on such charges. In fact, Officer Morgan did not actually arrest her here, nor did the Jennings CLC administration pursue any school discipline, let alone any criminal complaint.
>
> Under these facts, a jury could conclude that Officer Morgan's conduct was not objectively reasonable and the force he used on T.W. was excessive, in violation of her constitutional right to be free of such force. His claim of qualified immunity must fail.

The court further agreed that the prohibition on this degree of force had been clearly established. The Court affirmed the denial of summary judgement. '

<u>Jones v. Sandusky County</u>, OH 2016 WL 3269530 (6th Cir. 2016)

FACTS: On the afternoon of July 11, 2010, Jones became out of control due to drinking. His parents (Kim and Tracy) called for both family members and deputy sheriffs. Jones agreed to leave the house with a friend and not return that night. Kim went to stay at the home of a family member. Tracy, preparing to go to his night shift job, found Jones had returned. Tracy left the house and called 911, telling dispatch that Jones "had been abusing alcohol for several days, had threatened to kill his mother" and told Jones that he would "fight" the police if called. Arriving deputies could see Jones inside the house with a shotgun on his lap, sitting on the couch with his eyes closed.

> Sheriff Overmyer was familiar with Jones and called for a tactical response team. Dispatched called the house and got no answer. Jones "sat facing the deputies' vantage point. For the next 90 minutes, the deputies observed Bryan in the same posture; he made few movements. One deputy speculated that Bryan may have been dead (he was not). Sheriff Overmyer eventually ordered [the TRT] into the home." At about 11:30 p.m. they made entry through the kitchen, attempted a stacked, stealth entrance, and use a flashbang. At the same time, another officer was to break the window into the living room. The goal was to rush him and get him to drop the gun. Deputy Mario Calvillo was first in the stack with a shield and a handgun. The plan was executed, resulting in Jones being fatally shot by both Mario and Jose Calvillo, who was second in the second.

The Jones' filed suit under 42 U.S.C. §1983. A jury heard conflicting evidence, but no party disputed that the deputies believed the shotgun with loaded – during his 911 call, Tracy told dispatch there were loaded guns in the home, and dispatches relayed that information to the deputies." In fact, it was not loaded. Tracy was at the scene but they (and Kim and her sister, who also showed up) were not allowed to talk to him.

The Jones' "expert witness, David Van Blaricom, offered a number of criticisms of the tactics, timing, and planning of the entry; while defendants' expert, James Scanlon, opined that defendants' actions were reasonable given the lack of observed movement and the potential threat posed under the circumstances." Ultimately, the jury found in favor of the law enforcement officers involved, including the Sheriff, and the Jones' appealed.

ISSUE: Is the fact that a weapon was unloaded relevant in a use of force case?

HOLDING: No

DISCUSSION: Among other issues, the Jones argued that they were improperly prevented from noting to the jury that the shotgun was not loaded. The trial court "properly recognized that this fact should not be considered when judging the use of force from the perspective of a reasonable officer on the scene "rather than with the 20/20 vision of hindsight."[304] Nor would this unknown fact show that defendants acted recklessly for purposes of the wrongful death claims." It was immaterial to the expert's discussion of the legality of the plan, as was Jones' subjective intent, which could not be known to the deputies, either.

The Court affirmed the decision.

42 U.S.C. §1983 - SEARCH

U.S. v. Manning, 2016 WL 3357416 (6th Cir. 2016)

FACTS: Officers were called to Manning's residence on a noise complaint.[305] They encountered an individual in the parking area who admitted he'd come there to buy drugs and had done so before. The officers knocked, and could hear people inside, but "nobody answered." They also smelled an odor consistent with the manufacture of methamphetamine coming from the home and noticed multiple surveillance cameras on the property. They walked around the residence to try to make contact through a back door, or to see if anyone was trying to leave." Behind the residence, they found a burn pile that contained items "consistent with methamphetamine manufacture." The odor became stronger as they approached a window exhaust fan. They secured the scene pending a warrant and disabled outside surveillance cameras by pointing them to the ground.

As they were dictating information on the phone, for the warrant, a woman came outside "visibly agitated and seeking aid for someone in the house who she feared had overdosed on drugs." The officers entered and found Manning, "slumped over and unresponsive." The officers opened two doors nearby to ensure that no one else was nearby, and observed "observed paraphernalia consistent with the manufacture of methamphetamine, including bottles and tubing." Manning was sent to the hospital and the officers waited outside until they obtained a warrant. They included all the evidence from outside, as well as what they'd seen in plain view during the emergency.

When Manning was discharged, he was charged with "(1) conspiring to manufacture methamphetamine, (2) manufacturing methamphetamine, (3) possessing firearms after being convicted of a felony, and (4) using or carrying a firearm during or in relation to a drug trafficking offense." He moved to suppress, and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is an entry to administer medical aid allowed?

HOLDING: Yes

DISCUSSION: Manning argued that "several aspects of police conduct surrounding the search of his residence violated the Fourth Amendment, including that (1) officers unlawfully manipulated the surveillance cameras at the residence, (2) officers discovered evidence in an unlawful search of the curtilage of defendant's residence, (3) officers were not justified in entering his residence without a warrant to administer medical aid to him, (4) officers were not justified in conducting a protective sweep of the area around defendant as part of administering aid, and (5) the warrant and its supporting affidavit contained evidence gathered as a result of the illegal searches, and contained

[304] Graham v. Connor, 490 U.S. 386 (1989).
[305] Although not discussed in the decision, this apparently took place in Whitley County as part of a larger investigation that netted a number of defendants.

errors and omissions in violation of Kentucky law." The Court looked at each issue and found no error, and affirmed the plea.

U.S. v. Shepherd, 2016 WL 1580008 (6th Cir. 2016)

FACTS: When Shepherd, in company with others, returned to Floyd County, Kentucky following a drug-buying trip to Ohio, their vehicle was stopped. (Unbeknownst to the rest of the occupants, the driver was an informant and the vehicle was being tracked.) Shepherd was searched but no drugs were found. The officers believed he'd hidden the drugs in his rectum, as a result of evidence they had obtained.

Shepherd was arrested. The plan was to 'dry cell" him at the jail – put him in a cell without plumbing until he passed the drugs. However, on the way to the jail, he began to speak incomprehensibly and "'flopped over' when the cruiser rounded a curve." Fearing the bag had ruptured and he was suffering an overdose, they drove to the closest ER. Dr. Mutiso examined him, finding him a "little dazed" but otherwise normal. Shepherd became physically and verbally combative. The doctor did an X-ray and believed there was foreign matter in his rectum. Shepherd refused a digital rectal exam. The doctor did a CT scan and again, believed there were multiple capsules located there. The doctor again tried an exam and again, was refused. Believing the "emergency … had elapsed," he gave the officers two options, waiting, or getting a warrant to remove the package. The officers chose the latter, having been assured by the doctor that was a better choice under the circumstances.

The officers obtained a search warrant. He was sedated and a bag was removed containing a quantity of heroin, oxycodone and crack cocaine.

Shepherd was charged with conspiracy to distribute and possessing controlled substances. Shepherd moved for suppression, arguing the pre-warrant exams were a violation of his Fourth Amendment rights. Dr. Mutiso testified that the officers had not influenced his examination and that he had made the decisions. The Court agreed he was not a government agency and denied the motion.

At trial, Shepherd argued that the drugs were for his personal use, and bought in large quantities so that he didn't have to leave "the hills to go get more." He was in fact convicted of possession and conspiracy (but not distribution) and appealed.

ISSUE: Is using non-intrusive medical tests on a subject believed to have hidden drugs inside their body permitted?

HOLDING: Yes

DISCUSSION: The Court began, noting that:

> The Supreme Court has "consistently construed" the Fourth Amendment's protection against unreasonable searches "as proscribing only governmental action."[306] It can apply to private individuals, but only when they act as government "agent[s]" or with a government official's "participation or knowledge."[307] Later cases have emphasized that a private party's search is attributable to the government only "if the private party acted as an instrument or agent of the Government."[308] That "necessarily turns on the degree of the Government's participation in the private party's activities." In the context of a search, the defendant must demonstrate two facts: (1) Law enforcement "instigated, encouraged or participated in the search" and (2) the individual "engaged in the search with the intent of assisting the police in their investigative efforts."[309]

Shepherd argued the similarity of his case to the facts in U.S. v. Booker, in which Booker was given a paralytic drug, intubated and had drugs manually removed from his rectum, over his objections.[310] In this case, however, the court noted, the police here responded to what they perceived as a medical emergency, which weighs against a finding that they acted in a premeditated way to instigate or

[306] U.S. v. Jacobsen, 466 U.S. 109 (1984).
[307] Ibid. (quoting Walter v. U.S., 447 U.S. 649 (1980) (Blackmun, J., dissenting)).
[308] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989); see, e.g., U.S. v. Clutter, 914 F.2d 775 (6th Cir. 1990).
[309] U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008) (quoting U.S. v. Lambert, 771 F.2d 83 (6th Cir. 1985))."
[310] 728 F.3d 535 (6th Cir. 2013

encourage the search. Circumstantial evidence (the smell of feces, his co-conspirators' statements, recovered drug paraphernalia) reasonably made the arresting officers suspicious that drugs were hidden in Shepherd's rectum. This became a safety concern on the drive to the detention center. Shepherd was nonresponsive, "flopped over" when the cruiser rounded a curve, and then lay semiconscious in the back seat. Police brought him to the nearest hospital—not one handpicked for a physician experienced in aiding officers with digital rectal examinations. Shepherd presents no evidence that the officers gave false information about his medical condition or "knew" what Mutiso would do. (Both factors that could contribute to a showing that the state instigated or encouraged a body search.)[311] Consistent with the duty to provide medical care to an individual in police custody, the officers explained to the physician their theory of Shepherd's condition.[312] Mutiso testified at the suppression hearing that the officers did not influence his decision to evaluate Shepherd by x-ray and CT scan. Their rational response to a medical emergency bears no indicia of the calculation present in Booker.

Dr. Mutiso then, using sound medical judgement and the tools available to him, X-ray and CT scan, determined that there was no immediate problem. He did not proceed with an examination but advised the officers of their options. He honored the refusal and stated he would only proceed with a warrant or an emergency, clearly acting out of respect for Shepherd's medical well-being. The Court agreed that the "contact between Mutiso and the officers arose in service of that duty alone." Further, the medical evaluation tools – medical imagine - were not invasive, such as a forced digital exam or stomach pumping would be.

The Court affirmed his conviction.

Lange v. McGinnis, City of Benton Harbor (MI), , 2016 WL 1296753 (6th Cir. 2016)

FACTS: Lange was hired as the Benton Harbor police chief in 2009. A year later, in a financial bind, the city merged the police and fire departments, with Lange overseeing both. In 2013, Saunders was appointed as the Emergency Manager (a financial position) and shortly thereafter, received a complaint about the fact that Lange was not a firefighter. Advised that in fact, Lange should be required to be, Saunders put Lange on leave pending passing the firefighter-certification test. He was effectively suspended. The next month, he passed the written exam but not the practical part.

After that, he was offered a job as the Community Liaison Officer, and declined. He went on unpaid leave in October. He was denied the ability to retrieve his belongings, instead being told to itemize them and they would be gathered. He included a hard drive on the list. McGinnis, with the police department was instructed to clean off any city files, instead, Lange eventually got it back, with everything deleted.

Lange filed suit, arguing that the deletion of the files was a violation of 42 U.S.C. §1983, arguing search and seizure as the basis. McGinnis moved for summary judgement under qualified immunity and was denied. He appealed.

ISSUE: Is deleting items on someone's personally owned media storage device, which would include government information as well, permitted?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court agreed that clearly, McGinnis did a search and a seizure of the hard drive. Lange agreed the agency was entitled to delete/remove any city related files on the drive, and to do so, a search was necessary and non-investigative. Nothing would have suggested a constitutional issue to McGinnis. The question was whether deleting all of the files went too far. In fact, the Court noted, combing through the files one by one would have been actually more invasive. Again, there was nothing to suggest to McGinnis that what he elected to do was unconstitutional.

The Court reversed the District Court and awarded him summary judgment.

[311] *Cf.* George v. Edholm, 752 F.3d 1206 (9th Cir. 2014); Booker, 728 F.3d at 541.
[312] Estelle v. Gamble, 429 U.S. 97 (1976),

42 U.S.C. §1983 – JAIL

Richko (on behalf of Horvath) v. Wayne County, Michigan 819 F.3d 907 (6th Cir. 2016)

FACTS: On September 13, 2011, Dearborn officers arrested Horvath for an outstanding misdemeanor warrant, for a nonviolent offense. He was booked into the mental health ward due to prior identification. He was moved into another cell in the same unit after 8 days, and a second inmate was placed with him. On September 21, Horvath was scheduled for an x-ray. The deputy yelled for Horvath to come from his cell. Horvath objected to the need for the x-ray as he'd anticipated getting out. In fact, the deputy learned that the x-ray was cancelled. During that discussion, Horvath expressed no concerns about sharing the cell with Gillespie. He returned to his cell about 7:44 a.m.

That same time, Gillespie began to experience auditory hallucinations. As a result, he began ""by punching [Horvath] in the head and face several times, delivering blows to his face with his foot and knee, stabbing him multiple times in the face with a pencil, and sodomizing him either pre- or post-mortem, causing serious injuries resulting in his death." Gillespie later told investigators that he was angered by Horvath, whom he believed "was trying to be gay." Other inmates heard the attack but couldn't see into the cell. At 8:50 a.m., Nurse Williams came along and found Gillespie standing at the bars, and he exposed himself to her. She saw no sign of Horvath in the cell and reported him missing

Ten minutes later, Deputy Stinson requested another officer assist him in entering the cell. The jail deputies found Horvath sandwiched between two mattresses, critically injured. Nurse Williams and another nurse administered aid and CPR. He was declared dead at 9:29 a.m.

Gillespie had been brought into the jail for felony assault, having threatened a bus driver with a knife. He had self-reported that he was bipolar and schizophrenic, and was off his medications but the jail had no prior history on him. Because of strange behavior, he was referred to the mental health unit. A further evaluation by a jail nurse confirmed he had not taken any medication, as he'd been prescribed, but no attempt was made to obtain his medications. He was to have a mental-health exam but was placed in general population. The next day, he had an evaluation, where it was determined that, at the age of 22, he'd had well over 2,000 entries in to the mental health records in the county. There were no in-depth assessments, however, of what had been done, however. He did self-report six hospitalizations for "hearing voices," however. No recommendation was made to house him alone.

Richko, on behalf of Horvath's estate, brought claims against a number of parties, arguing that the parties would "deliberately indifferent to Horvath's need for protection from violent attacks by inmates, and that the individual defendants' deliberate indifference resulted from the deficient policies, training, and supervision on the part of the entity defendants." After discovery, only four parties remained. With respect to the County, the lower court agreed that "Wayne County "had a de facto policy of not requiring a review of readily-available prior mental health records, including the MH-WIN records.". It concluded that this failure to review Gillespie's mental-health records after being put on notice that he had a significant mental-health history, coupled with Gillespie's subsequent placement into Horvath's cell without further investigation, "may be considered a reckless disregard of the risk of harm" to Horvath sufficient to show deliberate indifference." All of the parties not dismissed, appealed.

ISSUE: Is there a constitutional right to be free from inmate on inmate violence?

HOLDING: Yes

DISCUSSION: The Court looked first to clarify "the specific source of the constitutional right to be free from inmate-on-inmate violence."

> In denying the defendants' motion for summary judgment, the district court appears to have based its holding solely on the Eighth Amendment right to be free from cruel and unusual punishment.. But the Eighth Amendment applies only to those individuals who have been tried,

> convicted, and sentenced.[313] Pretrial detainees like Horvath, on the other hand, are protected by the Fourteenth Amendment's Due Process Clause.[314] But such a misstatement by the district court is inconsequential because this court has made clear that, under the Fourteenth Amendment, pretrial detainees are "entitled to the same Eighth Amendment rights as other inmates."[315] The analysis set forth in *Farmer*, although rooted in the Eighth Amendment, therefore applies with equal force to a pretrial detainee's Fourteenth Amendment claims.[316]
>
> Richko's burden was to present evidence sufficient to allow a "reasonable juror could conclude that the individual defendants were deliberately indifferent to a substantial risk of serious harm to Horvath and that they disregarded that risk by failing to take reasonable measures to protect him.[317] Under this rubric, Richko must satisfy both an objective and a subjective component. She can satisfy the objective component by showing that, "absent reasonable precautions, an inmate is exposed to a substantial risk of serious harm."[318] The subjective component requires Richko to show that (1) "the official being sued subjectively perceived facts from which to infer a substantial risk to the prisoner," (2) the official "did in fact draw the inference," and (3) the official "then disregarded that risk."[319] "Because government officials do not readily admit the subjective component of this test, it may be demonstrated in the usual ways, including inference from circumstantial evidence . . . ."[320]

The Court agreed that Richko made the objective prong, as "the risk to Horvath of being housed with and attacked by an inmate who had recently been arrested for violent assault and had a history of serious mental illness was sufficient to fulfill the objective component of this analysis." Subjectively, looking at each named individual, the Court agreed that Cameron could have, but did not, access available data to get a more complete picture of Gillespie's situation. He was "

> (1) was aware of Gillespie's self-reported history of bipolar disorder and schizophrenia, (2) was aware that Gillespie had not taken his medication for these conditions for six days, (3) knew that Gillespie had been arrested the day before for attempted assault with a dangerous weapon, (4) knew that Gillespie had been hospitalized six times for his mental illnesses, and (5) discovered through the MH-WIN system that Gillespie had 2,334 prior encounters with mental-health services and/or providers over the past 11 years (equating to approximately 212 encounters per year since he was 11 years old)." That was sufficient to indicate that information was available, and not access, to show that he was aware of the risk Gillespie posed to others.

With respect to Stinson, the Court noted that he was at the duty station while the attack took place. Although he argued that he was far enough away that he couldn't actually hear anything that took place, there was still the issue of the gap between the time he was notified that Horvath was missing and his attempt to go and investigate. However, as these are disputed factual issues, the Court could not rule in his favor. The same reasoning went for Williams, who was also present on the ward during the fight, and arguably, at least, could have heard it.

The Court allowed the case to go forward with all three of the individual defendants.

INTERROGATION

U.S. v. Crumpton, 824 F.3d 593 (6th Cir. 2016)

FACTS: In 2013, Officer Farris (Wayne County SO) was provided information from a CI that an unidentified male was trafficking from a given address. Although the location appeared to be a single

[313] Bell v. Wolfish, 441 U.S. 520 (1979); Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985).
[314] See Roberts, 773 F.2d at 723.
[315] Thompson v. Cty. of Medina, Ohio, 29 F.3d 238 (6th Cir. 1994).
[316] Ruiz-Bueno v. Scott, Nos. 14-4149, 14- 4151, 2016 WL 385294, at *4 (6th Cir. Feb. 2, 2016) (noting that "Supreme Court precedents governing prisoners' Eighth Amendment rights also govern the Fourteenth Amendment rights of pretrial detainees").
[317] See Farmer, 511 U.S. at 842.
[318] Amick v. Ohio Dep't of Rehab. & Corr., 521 F. App'x 354, 361 (6th Cir. 2013) (citing Farmer, 511 U.S. at 836).
[319] Rouster v. Cty. of Saginaw, 749 F.3d 437 (6th Cir. 2014) (quoting Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001)).
[320] Dominguez v. Corr. Med. Servs., 555 F.3d 543, 550 (6th Cir. 2009)

family home, multiple mailboxes in front suggested it housed several unrelated occupants. The officer's investigation connected several people with the residence and ultimately, he showed the CI a photo of Crumpton, and he was identified. The CI then made a controlled buy from the residence. Officer Farris obtained a search warrant, which was executed on October 18.

> The search warrant was executed on October 18, 2013. During the search, agents found that the house was divided between front and back, but "[t]here was an access way that would allow someone to move about the house from the front to the back"—"[i]t was a small kind of hole in the wall." There were also entrances to the house in both the front and back.. The back of the house had two rooms, one of which was set up as a bedroom while the other was "more like a closet with just a bunch of clothes and stuff scattered." The front of the house had a cluttered room with a number of items that Officer Farris suspected were stolen property, and also a "room kind of like a bedroom off of this front room that had almost a studio setup, a laptop and speakers and DJ type equipment." Although a number of the rooms in the house could have been used as bedrooms, only one bed was found in the house (in the back bedroom), and a single mattress was found in the front of the house.

Ammunition was found, along with drugs, throughout the house, and "residency documents" were also located, linking the address to Crumpton. A total of seven people were found, four who indicated they lived there or stayed there. Crumpton was given Miranda and Crumpton admitted there might be some "old bullets laying around." "Agent Lotoczky [ATF] subsequently had another interaction with Crumpton, which took place in the Sloan Street Residence's front room. Lotoczky read Crumpton his Miranda rights ("the Second Warnings")—this time adding a fifth warning that "if you decide to answer any questions now without a lawyer present, you have the right to stop answering at any time.". Agent Lotoczky then discussed Crumpton's ability to waive his rights, at which point Crumpton asked to "see the search warrant and, uh, or the arrest warrant or whatever you have." Agent Lotoczky said he would "show it to you in a little while," and Crumpton reiterated his desire to see the search warrant. At this point, Lotoczky returned to a discussion of Crumpton's Miranda rights, and Crumpton flatly stated "I want to see the search warrant before I sign anything," then asking if "[i]t's like I'm giving consent then if I waive anything," seeming to think that the Miranda waiver would reflect his consent to the search of his home. Agent Lotoczky clarified that "the search warrant is for the house," explaining that "[w]hat this is saying is that I read to you your rights and you understand your rights" and "that we can talk . . . . And if you don't want to talk, you don't have to talk."

Crumpton agreed to talk and said more about the ammunition, but when the agent tried to turn the discussion to drug dealing, Crumpton continued to demand to see the warrant. It was finally produced. Crumpton continued to answer some questions but not others. He was charged with being a felon in possession and possessing with intent to distribute. He moved to suppress the search warrant and was denied. At the close of evidence, his counsel also objected to the language in the first Miranda, which apparently lacked a warning as to the right to discontinue questioning at any time. The Court ruled that the first statement could not be mentioned in closing, but the second, unchallenged one, could. He was convicted but in a post-conviction appeal, the court agreed that the second warning was also deficient. After additional proceedings, both sides appealed adverse rulings.

ISSUE: Is a perfect Miranda warning required?

HOLDING: No

DISCUSSION: The Court looked first to the Second statement, specifically the language below, noting that the agent directly contradicted the required warnings.

> Agent: Anything you say can be used against you in court. You understand that?
>
> KC: Yes. Um hmm.
>
> Agent: Okay.
>
> KC: Will we be going to court?
>
> Agent: No, I'm just saying, in general. Anything you say can be used against you in court. That's, these are your rights. I'm just, reading, reading them to ya on, off a piece of paper.

The Court reviewed other cases in which the language was deviated from, and noted that "in court" wasn't even legally required for a valid Miranda. The Court noted that "Far from indicating that Crumpton would never go to court and thus could waive his right to remain silent without consequence, this answer clarified that Agent Lotoczky was not telling Crumpton what would happen next that day, but instead was informing Crumpton of his rights and the consequences of waiving them. The district court brushed this aside as failing to "correct the misinformation he had just provided," The Court agreed that he conveyed everything required in the warning. Further, the Court agreed, Crumpton was not deceived into thinking he would never go to court, and that once the confusion was cleared up about the waiver (that he was waiving Miranda and not agreeing to the search), he willingly signed the waiver. He in fact did decline to answer some question, indicating he was aware he could do so.

The Court also agreed that "affiliation with and control over the front area of the Sloan Street Residence, when combined with his statement regarding his involvement in placing the ammunition in the house and holding it for someone else, is sufficient to support a jury finding of constructive possession." The court reversed the grant of his motion to acquit him on that charge.

Next, the Court looked to the search warrant, which he argued was deficient in that it failed to adequately reflect the address. The initiating officer used an incorrect street address, but "such an error does not invalidate a search warrant if the warrant includes other specific descriptors that remove the probability that the wrong location could be searched, especially when the warrant affiant participates in the execution of the search.[321] The warrant described the location in detail and it was the only residential structure in the immediate area. A number of descriptors were included, as well as a photo. Finally, Officer Farris was personally present at the scene. Further, even though a specific apartment wasn't identified, the court noted:

> As a general rule, "[a] warrant describing an entire building when cause is shown for searching only one apartment is void."[322] When a warrant is obtained for an entire structure, it is invalid if law enforcement "had known, or should have known," that the location was divided into separate units.[323] Furthermore, law enforcement officers are "required to discontinue [a] search . . . as soon as they discover[]" that a location is in fact subdivided into separate dwelling units, especially if it is unclear which unit belongs to the subject of the warrant. "[T]he validity of the search . . . depends on whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable." The record contains little to suggest that the government could have known prior to the search that the residence was subdivided. The investigation did not reveal the existence of subdivided apartments.[324] And although there were multiple mailboxes in front of the house, it is not clear how visible they were. The evidence in the record also suggests that any apartment numbers that may have existed were not easily visible.. Accordingly, aside from the existence of multiple mailboxes of indeterminate visibility, the record reflects nothing that could have notified the agents that they were looking at a dwelling with multiple apartments. This is not sufficient to put law enforcement on notice.[325] Crumpton presents a closer question with respect to what the agents would have learned upon executing the search warrant. Although there is no evidence that officers saw apartment numbers during the search, they did find that the structure was divided between the front and back of the house. To be sure,

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[321] See, e.g., U.S. v. Hang Le-Thy Tran, 433 F.3d 472 (6th Cir.) (warrant misidentified address, but correctly located the place to be searched as "on 28th Street, S.W. in the 900 block" and as having "a portioned-off storage room in the lower level of that building," and "[t]he executing officer . . . was also the warrant's affiant"), cert. denied, 549 U.S. 903 (2006); U.S. v. Pelayo-Landero, 285 F.3d 491 (6th Cir. 2002) (warrant may have misidentified address, but "include[d] specific directions from an identifiable point," "describe[d] the particular trailer by color, by a certain exterior trim, and by a wooden deck," as well as the "unusual feature" of "the number 954 displayed under a window air conditioner on the right end of the trailer," included a photograph of the trailer, and an affiant "was the team leader at the search")"

[322] U.S. v. Votteller, 544 F.2d 1355 (6th Cir. 1976). "[W]hen the structure under suspicion is divided into more than one occupancy unit, probable cause must exist for each unit to be searched." U.S. v. Shamaeizadeh, 80 F.3d 1131 (6th Cir. 1996)

[323] Maryland v. Garrison, 480 U.S. 79 (1987).

[324] R. 53 (Trial Tr. Vol. 2 at 64:24–65:6) (Page ID #667–68) (Officer Farris testifying that the residence appeared to be a single-family home from the outside); ("Through the course of this investigation, affiant was unable to observe any numbers affixed to the residence.").

[325] See U.S. v. Brooks, 294 F. App'x 71 (4th Cir. 2008) (officer's failure to notice multiple mailboxes and doorbells was reasonable where they were difficult to see and the officer observed the building at night from across the street).

"[t]here was an access way that would allow someone to move about the house from the front to the back," but "[i]t was a small kind of hole in the wall." Nor does it appear to have been a normal passageway akin to an unlocked door.[326] Crumpton responded that the hole had been created "to fix some wiring" and that he does not use the hole to pass from the front to the back portion of the house). Thus, unlike in the case cited by the government, there was a clearer delineation between the front and back portions of the house.[327]

Crumpton refers to a video of the execution of the search warrant on this point, which was introduced at trial as Exhibit 31 and was played for the jury. The video was not made part of the district court's electronic record, however, nor was it forwarded to this court for purposes of appeal. Because the video has not been made part of the record before us, we cannot evaluate its effect on the case. separate from each other," "[t]here is no indication that a person who lives downstairs could not go upstairs," and "[t]here do not appear to be any internal locks separating the allegedly distinct parts of the . . . house"). The manner in which the house was laid out did not suggest that there were separate living areas, however. The various rooms in the house that could have been set up as bedrooms were not, with only the back bedroom set up that way and the others appearing more like living rooms and storage for various items. Some of the belongings that Crumpton claimed during his conversation with Agent Lotoczky, including his pet snake and electronic equipment, were also found in the front area of the house. The lack of indicia that the house included any separate living areas, along with the suggestion that Crumpton used the front and back areas of the house, renders the government's belief that the house was a single residence reasonable.[328] Accordingly, the agents acted reasonably here in continuing to search the front portion of the house.

Lastly, the Court agreed that there was more than sufficiently supported and that the failure of the agents to leave behind a copy, while it a violation of procedural rules, was certainly not prejudicial to the case. The court reversed the adverse rulings against the government and affirmed Crumpton's convictions.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Dendel v. Washington / Robinson, 2016 WL 2641113 (6th Cir. 2016)
This case has petitioned for certiorari to the U.S. Supreme Court.

FACTS: Dendel served as the caregiver for her common-law husband of nearly 30 years, Burley. He suffered from a multitude of disabling physical conditions, and Dendel also suffered from medical conditions. **"**Dendel had become overwhelmed by the responsibility of caring for Burley, who became increasingly uncooperative. She received no help from his family and he was neither old enough nor ill enough to qualify for residential care. The day before his death, a visiting nurse had quit due to Burley's uncooperativeness. During that night, Dendel called the police because Burley was running around their apartment with a knife, but when the police arrived he was sitting calmly, and they declined to take him to the hospital.

The next day, Dendel reported he'd died. (She called a friend after she found him deceased, who called the police.) Despite talking to his family members during the ensuing week, she never told them he'd died. The initial autopsy indicated that he'd died of natural causes, but his sister was concerned as Dendel had told her that "she was overwhelmed and was considering injecting Burley with insulin." Upon follow-up, the ME indicated he had died from an insulin overdose, and had a zero glucose level, following a coma for perhaps 12 hours. (This conflicted with her indicating he'd been normal up until the time she

[326] See id. at 110:2–4 (ATF Agent Lotoczky: "[I]t looked to me that you could fit through there if you want, that you could squeeze through there.").,
[327] See U.S. v. White, 416 F.3d 634, 639 (7th Cir. 2005)
[328] Compare Shamaeizadeh, 80 F.3d at 1138–39 (police should have known that a basement apartment was a separate residence where "[t]he officers had previously discovered that the door connecting the upper floor and basement floor was locked," an officer "noticed that the apartment had its own den and refrigerator" and a resident of the home "had informed the officers that her access to the basement apartment was restricted").

found him deceased.) He also had a high level of morphine in his system, and the high dosage indicated he'd built up a tolerance for it.

Dendel was charged with Murder 2nd in Michigan (a charge that is similar to Manslaughter in Kentucky). At trial, she argued that he could have died from any number of causes and/or self-administered the insulin, although there was some question as to whether he could do so. Dendel was convicted and appealed.

ISSUE: Is it improper to deny a defendant the ability to question a lab technician regarding test results in evidence?

HOLDING: Yes

DISCUSSION: Dendel's trial counsel indicated that Dendel has insisted that the defense was that Burley had given himself the overdose, and as such, there was no challenge at trial on the cause of death. There was no evidence of any independent investigation, although the trial counsel indicated he'd made some medical inquiries. The Court agreed that the attorney's performance was deficient. That was, further, prejudicial to Dendel, as the evidence may have raised doubt as to her guilt.

Dendel also argued she was "denied the right to confrontation by the testimony of the head of the laboratory regarding test results that he did not personally perform." The state appellate court had agreed it was a violation, but harmless.

The Court upheld her ineffective assistance of counsel, but agreed the Confrontation Clause issue was harmless.

U.S. v. Dillard, 2016 WL 2800029 (6th Circ. 2016)

FACTS: In June, 2013, Robinson stole several firearms[329] from a Battle Creek police officer's vehicle. Robinson and Dillard gathered at Hayes' home and examined the weapons in detail. They all three fired the weapons. They all knew the guns were stolen. Dillard assisted in trading the guns for other items to Lewis, and with Robinson, transported them.
Dillard was convicted both with possession of unregistered weapons and because he was both a felon and a regular drug user. Dillard appealed.

ISSUE: It is proper to indicate a person had committed a similar crime before?

HOLDING: Yes (but see discussion)

DISCUSSION: Dillard argued that it was improper to allow Robinson to testify that he and Dillard had stolen items together before. The Court allowed it under FRE 404(b) because it would provide information about Dillard's knowledge that the items were likely stolen. It also limited the jury as to how to use it. The Court agreed that any error was harmless, in the face of the overwhelming evidence against him.

The Court also agreed that he was, at the time, a prohibited person, although there was an agreement that a felony in which he'd been involved would be reduced if he met certain conditions. At the time of the crime, he had not yet fulfilled those requirements. The Court also noted he admitted to regular marijuana use, which also served to prohibit him, although usually the AUSA did not prosecute such cases.

[329] The firearms included a MP5 that was registered under the National Firearms Act.

EMPLOYMENT – FIRST AMENDMENT

Tompos v. City of Taylor, 2016 WL 1319215 (6th Cir. 2016)

FACTS: Tompos was the Taylor, MI fire department from 2011 to 2013. During that time, budget reductions were in place that resulted in the layoff of more than 30 employees. During his tenure, Tompos made repeated complaints about safety and staffing issues for the department and was warned to "watch what he said to the media." Eventually, he was prevented from reporting directly to the City Council. He was finally terminated.
Tompos filed suit against the Mayor and the City, alleged a violation of the state whistleblower act and First Amendment retaliation under 42 U.S.C. §1983. The latter charge was dismissed and the former remanded back to the state court. Tompos appealed the ruling that indicated he was a "policymaker" and thus not entitled to First Amendment protection.[330]

ISSUE: Does a government employee face some First Amendment restrictions?

HOLDING: Yes

DISCUSSION: The Court noted that to make out a claim for First Amendment retaliation, three elements must be met: the person must be engaging in constitutionally protected speech, must be subject to adverse action or deprived of a benefit and the protected speech must be a substantial or motivating factor in the adverse employment action.[331] Further, to prove the first element, three more element must be shown – that the public employee was speaking as a private citizen, not pursuant to official duties, it must involve a matter of public (not just internal) concerns, and that the interest of the citizens in the matter must outweigh that of the state[332] As a rule, under Pickering, the interests of the state will prevail.[333]

The court looked at the categories of policymaker as laid out by Elrod/Branti and agreed that the position did qualify as such, given the degree of discretionary authority with which he was vested.[334] Further, although he argued that his protests related to safety issues, the Court agreed it was inextricably bound up in the budget

The court upheld the summary judgement.

EMPLOYMENT - ADA

Pena v. City of Flushing, 2016 WL 3182708 (6th Cir. 2016)

FACTS: During 2009/08, Pena worked as a city employee for Flushing. A coworker made comments about his national origin (Mexico) and Pena complained to his supervisors and the city manager. During this time, he experienced workplace stress that led, he said, to his being distracted and not properly performing his duties. He was placed on paid leave and his employer sought clarification as to his situation. Workplace training ensued and Pena returned to work. His co-workers were not happy, but all indicated things had approved. He continued to work without incident until 2013, when he again became distracted and stressed at work, and led to actions that he alleged were retaliation for a medical leave he took in 2012. He against sought treatment and was placed on medical leave, turning in a "non-descript doctor's note." He discussed his concerns with his supervisor, Bow, but not in sufficient detail and in a rambling, incoherent fashion. Bow, who had known him for years, became concerned with his actions as he seemed to be a "different person" that day. The leave was granted and then extended, and

[330] Rose v. Stephens, 291 F.3d917 (6th Cir. 2002).
[331] Brandenburg v. Hous. Auth. Of Irvine, 253 F.3d 891 (6th Cir. 2001); Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle, 429 U.S. 274 (1977).
[332] Westmoreland v. Sutherland, 662 F.3d 714 (6th Cir. 2011); Garcetti v. Ceballos, 547 U.S. 410 (2006); Pickering v. Bd. Of Educ. Of Twp. High Sch. Dist. 205 (1968); Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980).
[333] Pickering, supra..
[334] Elrod/Branti, supra.

when Pena indicated he was ready to come back, he was ordered to take a separate medical evaluation and clearance – a "fitness for duty" exam at the city's expense.

Pena went to see the doctor, but did not undergo an exam, opting to reschedule it and use that time to consult with someone else. Despite ongoing demands to see the doctor, he continued to refuse, instead, asked his own doctors to share information. The City finally terminated him in March, 2014, based on his refusal to see the city doctor. Pena filed suit, arguing that City "violated the ADA by: (1) requiring a medical examination that was not job-related and consistent with business necessity; (2) not allowing him to return to work and ultimately terminating him because it regarded him as disabled; and (3) retaliating against him for exercising his ADA rights. He also claimed the City violated Title VII by: (1) not allowing him to return to work and ultimately terminating him due to his race and national origin; and (2) retaliating against him for exercising his Title VII rights." The Court ruled in favor of the city and he appealed.

ISSUE: Is it proper to require a medical examination with respect to fitness for duty?

HOLDING: Yes

DISCUSSION: The Court noted that:

> The ADA prohibits employers from discriminating "against a qualified individual on the basis of disability."[335] "Disability" includes "being regarded as having such an impairment." § 12102(1)(C). Under the McDonnell Douglas burden-shifting approach, an employee establishes a prima facie case by showing: (1) defendant regarded him as disabled; (2) he is otherwise qualified for the job, with or without reasonable accommodation; and (3) he suffered an adverse action because of his disability.[336] Relying upon our decisions in Kocsis v. Multi-Care Management, Inc.[337] and Sullivan v. River Valley School District,[338] the district court concluded that directing Pena to be seen by a doctor before returning to work did not constitute regarding him as disabled.
>
> In Kocsis, we rejected the notion that mere knowledge of an employee's health problems, supplemented with the employee's belief that she had multiple sclerosis, rose to the level of treating the employee differently because the employer regarded her as being disabled:
>
> From this knowledge, Kocsis argues, the defendant viewed her activities as being substantially limited. In our view, however, there is virtually no evidence to support that position. Kocsis' performance evaluations reveal that the defendant was aware of her health problems, lack of energy, and mood swings. While the defendant may have perceived that Kocsis' health problems were adversely affecting her job performance, there is no evidence that defendant regarded Kocsis as being unable to care for herself or to perform all of the duties of her job. Therefore, Kocsis cannot establish that she had a disability under the "regarded as" prong of the definition.

The Court looked to Sullivan, as well, noting that an employer needs to be able to determine why an employee is behaving in an aberrant manner – and that does not necessarily mean that the employee is disabled. In the 2008 amendments to the ADA, "Congress liberalized the standard, redefining "regarded as having an impairment" only to require that a defendant took a prohibited action based on a perceived impairment, regardless of whether the employer thought the impairment was substantially limiting."[339]

The Court agreed that when a person's' "aberrant behavior" raised concerns about his work performance, giving the employer "reason to seek further information about his fitness for continued employment."" It is proper to require a fitness for duty exam. Such exams are expressly limited to "those where the employer can show that it is "job-related and consistent with business necessity."

> But Sullivan's discussion regarding fitness for duty examinations provided three caveats that are especially fatal to Pena. First, an employee "may not dictate the terms of his medical

[335] 42 U.S.C. § 12112(a), (b).
[336] Demyanovich v. Cadon Plating & Coatings, *L.L.C.*, 747 F.3d 419 (6th Cir. 2014).
[337] 97 F.3d 876 (6th Cir. 1996),
[338] 197 F.3d 804 (6th Cir. 1999),
[339] Neely v. Benchmark Family Servs., No. 15-3550, 2016 WL 364774, at *6 (6th Cir. Jan. 26, 2016) (citing 42 U.S.C. § 12102(3)(A)).

examination." In other words, that Pena's doctors cleared him for duty does not excuse him for failing to see Dr. Forsberg.

Second, we emphasized that employers may "requir[e] mental and physical exams as a precondition to returning to work" and that "[w]e have also upheld a finding of insubordination for refusing to submit to such exams." Accordingly, "an examination ordered for valid reasons can neither count as an adverse job action nor prove discrimination.". In Pena's case, this means that the City's request for him to attend a fitness for duty examination is not an adverse action sufficient to satisfy a prima facie case of disability discrimination.

And third, we concluded that by failing to submit to examinations, an employee is "precluded . . . from being able to establish a genuine issue of material fact as to whether the exams were related to his job, or were too broad in scope." Thus, Pena's protestations regarding the City not providing Dr. Forsberg with his job description, Dr. Forsberg being a psychologist and not a physician, and the City not consulting with an outside health official prior to the referral are without merit.

The Court upheld the dismissal.